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THE AMERICAN CONSTITUTION
AS IT PROTECTS PRIVATE RIGHTS

THE
AMERICAN CONSTITUTION
AS IT PROTECTS PRIVATE RIGHTS

BY
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NEW YORK
CHARLES SCRIBNER'S SONS
1923

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Printed in the United States of America

Published October, 1923



PREFACE

This work was originally undertaken as a new and revised edition of the writer's smaller work on the same subject published in 1908. But the vitality of our National Constitution is in nothing better shown than in the fact that the problems controlled and interpreted by it at one time are quite different from those being submitted only fifteen years later to its test. It soon became evident that in order to bring its discussions in line with present questions the author should rewrite the whole book. Furthermore, an additional chapter was needed to discuss the portentous growth of the process of Amendment. Only the old Chapter VI, present Chapter IX, has been left nearly intact, as the Constitutional principles concerning the division of power among the Nation, the States, and the People do not change, however much events may modify them in practice. Therefore, instead of calling it a new edition, it has seemed proper to modify slightly the title. For this book treats of the Constitution solely on what may be called its human side, leaving that which concerns our frame of government and its past history to the earlier work. The need of a simple essay of the sort, not a law-book but a treatise for ordinary citizens, seems obvious at this time; and the several excellent books on the Constitution recently published consider

solely or mainly its political side, or the frame of government. Indeed, some eminent speakers seem to think it is nothing more than this. And many people do not know what we mean by the Bill of Rights. To such this book is dedicated.

CLAUSES

IN THE U. S. CONSTITUTION PROTECTING PRIVATE RIGHTS

PREAMBLE. "We the People of the United States, in Order to . . . secure the blessings of liberty to ourselves and our posterity . . ."

ARTICLE I, 1. "All legislative powers *herein granted* . . ."

ARTICLE I, 2, (1). ". . . Representatives . . . chosen every second year by the People of the several States . . ."

ARTICLE I, 2, (3). "Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers . . ."

ARTICLE I, 3, (1). ". . . two Senators from each State . . ."

ARTICLE I, 7, (1). "All Bills for raising Revenue shall originate in the House . . ."

ARTICLE I, 8, (1). "The Congress shall have Power (1) To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States";

ARTICLE I, 8, (12). "To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years";

ARTICLE I, 8, (16). ". . . reserving to the States respectively the Appointment of the Officers, and the authority of training the Militia according to the discipline prescribed by Congress";

ARTICLE I, 8, (18). "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

ARTICLE I, 9, (2). "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

(3). "No Bill of Attainder or ex post facto Law shall be passed."

(4). "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census . . ."

(5). "No Tax or Duty shall be laid on Articles exported from any State."

(6). "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another."

(7). "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

(8). "No Title of Nobility shall be granted by the United States . . ."

ARTICLE I, 10, (1). "No State shall . . . emit Bills of Credit; make any Thing but gold and silver Coin a Tender in payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . ."

(2). "No State shall, without the Consent of the Congress, lay any Imposts or Duties, on Imports or Exports . . ."

(3). (Or) "any Duty of Tonnage . . ."

ARTICLE II, 1, (7). (The President has to make oath to) "preserve, protect and defend the Constitution of the United States."

ARTICLE III, 1. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

2. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties . . . to Controversies . . . between Citizens of different States . . ."

2, (3). "The Trial of all crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; . . ."

3, (1). "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, . . ."

(2). ". . . no Attainder of Treason shall work Corruption of Blood, . . ."

ARTICLE IV, 1. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. . . ."

2, (1). "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

(2). "A Person charged in any State with . . . Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive authority of the State from which he fled, be delivered up . . ."

4. "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

ARTICLE V. "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress;

Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

ARTICLE VI, 2. "This Constitution, and the Laws of the United States which shall be made *in Pursuance* thereof; and all Treaties . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

3. ". . . no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

AMENDMENTS

ARTICLE I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercises thereof;

"or abridging the freedom of speech, or of the press,
"or the right of the people peaceably to assemble, and petition the Government for a redress of grievances."

ARTICLE II. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

ARTICLE III. "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

ARTICLE IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

ARTICLE V. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of War or public danger,

“nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb,

“nor shall be compelled in any Criminal Case to be a witness against himself,

“nor be deprived of life, liberty, or property, without due process of law,

“nor shall private property be taken for public use, without just compensation.”

ARTICLE VI. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,

“and to be informed of the nature and cause of the accusation;

“to be confronted with the witnesses against him;

“to have compulsory process for obtaining witnesses in his favor,

“and to have the Assistance of Counsel for his defence.”

ARTICLE VII. “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,

“and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

ARTICLE VIII. “Excessive bail shall not be required,

“nor excessive fines imposed,

“nor cruel and unusual punishments inflicted.”

ARTICLE IX. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

ARTICLE X. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

ARTICLE XIII, 1. “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party

shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. "Congress shall have power to enforce this article by appropriate legislation."

ARTICLE XIV, 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

"nor shall any State deprive any person of life, liberty, or property, without due process of law;

"nor deny to any person within its jurisdiction the equal protection of the laws."

ARTICLE XVI. "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, . . ."

ARTICLE XVIII, (1). "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

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THE AMERICAN CONSTITUTION
AS IT PROTECTS PRIVATE RIGHTS

CHAPTER I

THE HUMAN SIDE OF THE CONSTITUTION AND ITS PRESENT NEED

The first suggestion for this book was a series of eight lectures delivered before the Lowell Institute at Boston, in 1907, which were published under the Roosevelt administration. Since then many changes have come to that popular sentiment which, after all, in the last analysis, is the interpretative voice of our great instrument of freedom. Dangers which then appeared to threaten our popular liberties have, for the time at least, disappeared. A great war has been fought and other and greater dangers have arisen. Half our people, unschooled in the history of constitutional liberty, have suddenly had the burden of government thrust upon them. A new tide of immigration from the unfree countries of Europe has come to share it, and this at a time when a wave of discontent with all government has followed on the wreckage of the Great War. And in the emotional upheaval of the time the discovery that a written constitution, devised to protect our liberties, might, by amendment, be made an instrument as well to bind as to loose them has raised spectres of new peril which only the wisest and the simplest instruction can avail to lay.

Since Roosevelt's day a new era has begun. With the constitutional amendment giving to the Federal Government the power of direct taxation, it has been able to fight a great war; hardly less changed itself by this than the countries where the war was fought. The women's vote has come to quicken this impulse, the prohibition amendment is an object-lesson of its power. When, therefore, I was invited to revise and reprint my lectures of 1907, I soon found that it would be necessary to rewrite them entirely. And because, since 1907, many other brief studies upon our Constitution have appeared, it was necessary to explain why even a new edition of my own was justified, still less another book.

It is, firstly, because nearly all books upon this subject are *law-books*, text-books; this I hope to make understood by a man or woman who does not know a word of law. Secondly, and chiefly, because these other books are mostly concerned with the *frame* of our government; the relations and powers of the three departments, Executive, Legislative, Judicial, as well as of the State to the Nation, and conversely of the National Government to the States; clause by clause and word by word they take up our written Constitution and explain these things. This book is concerned with none of them—save, as it affects individual right, the last—but with things that for the most part they omit: the relations of the National Government to the people, to the individual citizen, and to the people's rights and liberties; and all that vast doctrine of free-

dom and protection which can be hung on no express word of the Constitution, no phrase literally and narrowly taken, but on its historic language pregnant with meaning, its "words of art," each word bringing the lesson and bearing the fruit of the thousand-year struggle of the English race for liberty—a liberty more important when personal than national, and itself the realization in which the Americans, our founders, sought by a written constitution to found a free republic that should endure for all time.

A quick-witted Irishman once called down from the gallery at a public meeting where I was saying things of this sort. Desiring to put the case of the anticonstitutionalist as strongly as possible, I had said that there were some who could not see why a constitution, that is to say, the *writings* of men long dead, should control the *actions* of men now living. "By God," said the Irishman, "that's so!" And now, with organized movements to do away with the Constitution, to make ordinary Acts of Congress override it, to give to Congress an appeal from the courts enforcing it, or a recall of any decision by popular vote, that Irishman's state of mind has become sadly general. It is the object of this book to answer it.

And the answer, for an Irishman, should be easy. An Irishman is traditionally "against the government." So is the Constitution. On its human half—the Bill of Rights contained in the first ten amendments and its other sweeping restrictions on Congress, State governments, and the Executive—that is exactly

what the Constitution is for. Its very object is, not to protect our liberty against foreign aggression—for that was secured—but to secure our liberties, our people's, yes, each person's—against the powerful central government they were about to establish; and even, in essential matters, against the new State governments as well. And that government was to be republican. Both Nation and State were to be and remain republics. Connecticut even called itself a republic, not a State. The only original expressed ground on which the central government could interfere, intervene, coerce a State was when it ceased to maintain a republican form of government.

Our electorate is now far more than half made up of new voters: foreigners, largely from the unfree countries, and women, who have not had hitherto to concern themselves about these things. Now they must. The burden of voting has been added to their higher tasks, and it is necessary, for the permanence of our Republic, that they should understand the origin, the meaning, the past history, and the present need of those principles which were first written out in that document entitled the Constitution of the United States.

It is an error to call it, as Gladstone did, "a work struck off at one time, by the brain and purpose of man." If it were only that, it would deserve little more attention than my Irishman accorded it. If it were but like the rules of a game drawn up by a group of men of 1787, however wise, we might with more

equanimity contemplate its being neglected, amended, rejected, or outvoted by any momentary majority, in any rift of party passion or stress of need. Only the words of the Sermon on the Mount are sacred for all time. Conditions do change, and the world alters. What was true in 1789 need not necessarily be true of 1923. But the words of our Constitution were not true only in 1789, nor were its principles first "struck off" in 1787. Only its first object was to establish a government; its second, equally important, was to protect the people against it.

The young are impatient of restraint; and people newly clothed with power are in haste to use it. Women are believers in direct action; and the larger part of our immigrants have known no other way of government. Small blame to them! When a woman wants her boy to be good she doesn't tell him *what for*, but *how*; and she takes him up by the scruff of his breeches and sets him down where he ought to be. When a Mediterranean man or a Slav wants reform he makes a revolution. Temperamentally, when they want a thing, they want it here and now. And if they can only make men good—or earn a good living—by violating the Constitution, they say to hell with it. At least, my Irishman does. But both have a fundamental misconception—that our Constitution is a restraint and not a safeguard.

But lack of education, experience, familiarity with the past history of that race which since it emerged from northern forests nigh two thousand years ago

has ever fought with its lives and fortunes to attain liberty—to make good the English notion of freemen's law against the Roman idea of a sovereign's command—is not peculiar either to our women or to our naturalized citizens. Such things are not taught in our schools, nor generally even in our colleges. Constitutional studies are reserved for the law student—the one person who is likely to acquire something of such knowledge in the daily practice of his profession. And our common schools, though until recently required in some States to give a considerable time each week to the effect of alcoholic drinks on the constitution of the human stomach, and in others half an hour weekly to the history of the flag—a pretty piece of sentiment, but it can be learned in ten minutes—usually devoted no time to the Constitution of the United States, nor to the effect of its abuse upon the life of the Republic.*

It is even our native-born young people who are the more indifferent to it. For a dozen years the writer gave such a course of instruction in Harvard University, not in the Law School but in the college, where he might hope to reach those young men who did not mean to become lawyers but business men, newspaper men, men of other professions, or men who merely desired to become good citizens or enter public life. And the larger number of his students were not American

* Since the above was written, both Pennsylvania and Massachusetts have enacted statutes requiring instruction (not mere memorizing) upon the Constitution in the schools; and it is to be hoped that other States will follow their example. But in Massachusetts the clause making this law also applicable to private schools was stricken out.

born, but of foreign parentage—Hebrews, Russians, Lithuanians, Armenians, Poles, Italians, and Irish. And when asked why they chose that course on the Constitution, they usually answered: "My father wanted me to." "And why did your father want you to?" "He came from Russia, Poland, Asia Minor, or the Levant (as the case might be), where they have no constitution; he knows that peoples have no rights without one; he came to America because the people here are free, and he wants me, first of all, to learn to understand your Constitution."

But the great constitutional principles were ever present in the minds of our ancestors. They believed King George was departing from them, and they watched him and his ministers more closely than our people do our Congress or the growing machine of the central government. Men then had an inherent understanding and grasp of these things, a cast of mind transmitted through many generations; and it is this temper, this knowledge, that we must hasten to impart to our immigrants, and waken our women voters to interest themselves in. They quickly grasp that law means power; but they do not yet understand that only that law can survive which has been tried out in the customs of a free people, whose principles are in harmony with the Constitution of the Republic—if that Republic itself is going to survive.

Superintendents of our schools tell me they have not teachers competent to teach these things simply and intelligibly. It is true that to teach simply and inter-

estingly a great subject is the highest of educational arts. But let us get them, then! And, after all, there may be text-books, and an intelligent teacher with a text-book can teach himself and his class as well.

The power of lawmaking is a great power, the possibilities of government seem at first sight unbounded, and women and reformers want quick results. But this Constitution of ours is not a mass of dry rules, but the very substance of our freedom; not obsolete, but in every part alive; more needful now than ever, and as fitted to our needs. In nothing is this better shown than that, since the publication of those Lowell lectures in 1907, we find an entirely different part of the Constitution to accentuate. Then, our chief constitutional peril seemed to be executive aggression; to-day it is Federal and legislative usurpation on State and private prerogative. This is why to any student of our National history the words of the Constitution, like some of Washington or Lincoln, seem almost inspired; its lessons are for all time, and seem to have a new meaning with every age. Yet none can be called obsolete. And the more popular the impulse, the greater its danger to the Constitution. The English people, in a thousand years' experience, found that their liberties were never so really in danger as when they knew it least, never so nearly lost as under popular kings; and the same is true of legislatures. The people lose their liberties when they are of one mind with the sovereign power, be it King or Congress; when they are willing to subordinate their liberty birthrights to the passion for

equality or any other immediate end. And it seems as if a portion, or a party, of our people were in danger of adopting the European view of government and of lawmaking—that law is a command of a sovereign, not a custom among free people long in growth; that Congress or the administration ought to be omnipotent; and that whatever power a European great power had or has necessarily resides in our Executive or in Congress—although the whole history of our Republic is that it is the first great attempt of a free people to keep certain of such powers in their own hands, at least until they choose to give them up, and to base for all time their National career upon undying principles as written in those tablets wherein only our people have expressed their will to be governed and their desire that by them their Republic shall endure.

In England attacks on people's constitutional liberties were (and of course can only be) made by the King—John, Henry VIII, Elizabeth, James I, Charles I, Cromwell in his later days, George III—never by a law of Parliament, the representatives of the people, as to principles of “natural right,” except perhaps the Long Parliament when it lost its head under the last years of Charles and the first of Cromwell, before he did away with it and all representative government at the point of the sword; and except by modern war or postwar Parliaments, subject to no express constitutional restraint, especially as to Ireland. Many things which they have done, Acts or actions, would not be possible under our American Constitution. While the

judicial branch of government, not being in England co-ordinate as with us, but merely the creature of the other two, and being there possessed of no power to set aside laws, naturally made no such attack, but on the contrary stood up, and steadfastly, for the constitution against the King. His method of approach to undermine the constitution was usually by interference with other than duties properly executive, that is to say, with the Parliament or with the courts—seeking to make the laws or to adjudge them. There being in the English Constitution no precise doctrine of the separation of the powers, it was easy for him to do this; and it was the very experience of this by our forefathers for many centuries which gave them the wisdom to found our own Constitution upon this as one of its basic principles.

Some of the old constitutional rights which were thought of importance under the Tudors, or under the Stuarts, or even under the Georges, may at first sight seem unimportant or unnecessary now; yet we should be slow to dismiss them as obsolete. Nothing could have seemed more obsolete, under Cleveland, than the Bill of Attainder; under McKinley, than the constitutional principle forbidding King or President to suspend the law; under Taft, than that forbidding the President to enact one; yet all three were since attempted; while Congress as well as the States have been enacting plenty of laws which dangerously encroach on the rights of trade and of labor, of free speech, free (as John Milton called it, unlicensed) printing, freedom of the person or

home, and the general cardinal rights of liberty and property, and, more lately, on that principle, earliest of all in the English Constitution, last to be surrendered by us when we fought the Revolution, that all taxation must be for the *general* good, the good of all, and not of a class, or trade, or order, or locality.

So we say that the study of Anglo-American constitutional law is that of the liberties of the people; neither a body of technicalities, as the demagogue calls it, nor a new instrument first created in the year 1787, and now but an inconvenient impediment to our National destiny; it embodies, but far improves upon, that English Constitution which itself but registers the totality, the aggregate, of those great ideas which in eight centuries of struggle the Saxon people won back from Norman kings, the English from Stuart kings with a Louis XIV conception of the sovereign's state, the British from German kings. Each rising wave of freedom left its record in some historic document—then perhaps the times caused it to recede again—until the next flood of liberalism came to leave a higher record still. And our Federal Constitution itself is nothing but a code of the people's liberties, civil and political, of many centuries growth, but which they here wrote out in 1787, and willed that it should never be transgressed nor altered by Congress, court, or President, but only at the people's solemnly expressed will.

I said eight centuries; but these principles go back of that. William might conquer England, but not its

law; and after each wave of Norman tyranny they emerge clearer than ever. At last, in the English Revolution, the Crown gave up all attempt to hold itself above them. And at our Revolution we added others. First, the great invention that a man might be protected in his liberties not only from the King, the Executive, but from government of any sort, from the very government we were about to create. Second, the great principle of the separation of the powers, which first appears in the Virginia Bill of Rights of 1776 one month before the Declaration of Independence and also written by Thomas Jefferson, and best perhaps in the Constitution of Massachusetts of 1780, the closing paragraph of its Bill of Rights: "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers or either of them: to the end it may be a government of laws and not of men." Daniel Webster called these last ten words the greatest that are contained in any constitutional document. Third, and perhaps the greatest of American constitutional principles, quite novel in the history of the world, that wonderful scheme whereby local self-government, the control by the people of their own affairs, from pre-historic times a cardinal Anglo-Saxon right, was recognized, and conjoined with a powerful national government which worked directly on the people, not on the

states of a league, as had been the case in all other federations of history and even under our own Continental Congress; so that we, the people, manage our own domestic affairs, sue and are sued in our own local courts, make our own local laws, while yet we have clothed the National Government at Washington with power adequate to defend the Nation, maintain its dignity abroad, and duly to regulate affairs of National concern. And fourth, the plan which has saved and preserved the Constitution itself and made its working possible—the making, not the King, the Executive, nor Congress, the Parliament, the protector, judge, or censor of the Constitution, but that other branch of our government which has no power in itself, and is most likely to be trained therefor and to be fair in its judgments, the judicial branch; and for this purpose to give it power to judge between the central government and the people or the States, or between the States themselves or persons of different States; and so to protect every one, from a sovereign State to the meanest citizen, in the unmolested enjoyment of all his rights guaranteed him by that Constitution. Therefor they created the Supreme Court of the United States, and said that all judges “should be bound thereby.” Nothing in the world has ever been like this before. In our land alone can the humblest citizen whose rights are violated, by individuals or by government or by so-called law, go alone into court and get redress against the individuals and protection or punishment against the official, even if against the State, and even to an

annulment of the law that oppresses him, if counter to the great Charter of our land.

So is our Constitution not only, or not mainly, as so many people suppose, just a sketch of our frame of government. That part you might safely leave to the student or the politician. It is the living gospel of the liberties of the people. It is not a compilation of restrictions and restraints upon them, as some would have us believe, but the palladium of those essential liberties, and duties too, without which no man's home or living, peace or livelihood, happiness or freedom, is safe from an ambitious ruler, an envious neighbor, or a grasping State. And this part we must not neglect fully to understand and patriotically to enforce at risk of losing all that heritage which men before so painfully, laboriously, devotedly, have won.

Our ancestors had a vivid memory of these ancient struggles. And, in the past, man's peculiar concern has been with law, with modes of government; and this, with Englishmen, means free government. Men's books are full of this; so their minds perhaps are more wonted still to this way of thought than are women's. If there be an inherited cast of mind, they are, perhaps, more tinctured with the letters of the Constitution. For many ages past, by bitter experiences, they have been taught not to sacrifice the great principle to the concrete fact; the hard-won law of human liberty to the accident of the moment. But women have had other things to think of. Now, in Ruskin's phrase, they must "unto this last." Women's thought must take

it up, women's clubs must discuss it, women's political parties (if unfortunately there are to be such things) must align themselves upon it, this Constitution of the United States.

These are dangerous days. Although representative government has been thought the chief political discovery of the English people, first used in the very assembly which drew up Magna Carta, copied everywhere since, like trial by jury, with us all true representative system is disappearing. Timorous congressmen vote, not according to their convictions, or even their intelligence, but under the whip of any organized lobby. That they are frequently misled thereby, even as to the majority will, has recently been shown in referenda elections. They should remember Burke's famous address claiming to use his own judgment against that of his electors of Bristol. But direct legislation is the fashionable cry in politics, as is direct action in industrial disputes. Even a congress of rubber stamps might be tolerable if it correctly interpreted public opinion. But public opinion is not true public opinion before it has been instructed; and they leave undone their duty of instruction. Any organized crowd, any minority however small, if determined and with a good publicity outfit, particularly if they are women, or have some sentimental cry behind them, can to-day get what they like of Congress, however prejudicial to the interests of the States and of the great majority of the people. Educated public opinion has no organ, and certainly no lobby. The only

thing that stands in the way is our Constitution. For that our fathers established it. Therefore, the cry to do away with it. The lobby is to have its way, regardless of the Constitution; and Congress is to out-vote the Supreme Court.

To an Englishman born, like Mr. Gompers, there seems no objection to this; but there is precisely the greatest difference between the English Constitution and ours. Ours protects us against even the legislatures, and, in their "natural" or cardinal rights, minorities against majorities, even the individual against the mass. So the Constitutions of Washington and Utah say that *the object of government is to protect and maintain individual rights*. The distinction between tyranny and constitutional government lies precisely in this. But it takes a 100 per cent American (the cant phrase is fitting here) to understand it.

The hotheads object to the Supreme Court's "annulling a popular law." But does it "annul," and is an unconstitutional act of Congress or a State to be regarded as the people's will? The Constitution is the permanent will of the people; a law is but the temporary act of their representatives, who have only such power as the people choose to give them, and are never to be presumed to act against the people's permanent will. When the people of a State, or of the United States, come together and make a constitution, they are performing the highest possible political act; and they themselves are the highest political power known to free peoples. The people of Oklahoma, of the new-

est State, Porto Rico perhaps to-morrow, when they come together to frame a constitution of government are the supreme political assembly known to the free world. They are the very source of all political power; nothing can withstand their will; and, when expressed, it is permanent until they themselves in the same way choose to change it. Legislatures are but a representative committee, empowered to act only within the Constitution, for convenience delegated with a few, and only a few, of the powers of a free people. England, the mother of Parliaments, invented this system of representative government, and it now prevails, in theory at least, in every country in the Christian world, present Russia being an exception to both. But we improved on it. Parliament, in England, has all the powers of the people; not so our legislatures. They can act only in matters the written will of the people has permitted to them, and that only in the manner permitted.

So it is incorrect to talk about the Supreme Court's "annulling" a law. No *law* can be annulled. But when there is an Act of Congress or a State legislature on the one hand, and on the other the permanent will of the people expressed in a written constitution, and the two conflict, the courts have to choose which is the "law"; and that of course must be the higher law, their permanent written orders, and not the act of their representatives beyond the authority given them. This latter is not really law at all; for under the American idea that cannot be law, whether made by Congress or

a State legislature or ordered by the President, officer, board, or commission which clashes with the written will of the people. No other country in the world has fully established this principle—though copied in the constitution of some South American republics—whereby not even the government can make a law counter to the Constitution, nor any officer do an act not authorized by it; and in either case the Supreme Court is made the umpire to judge. This system has been the envy and the marvel of the civilized world.

The English Constitution grew up to protect the people against the King, the executive, not against bad laws, the Parliament. It was a bulwark against Charles Stuart, Henry VIII, and George III; but it was no bulwark against the Rump Parliament of the later commonwealth or against the corrupt Parliament of the Tudor kings. Therefore, in England, when the kings sought to oppress the people, they were apt to make the effort through a subservient Parliament even more than by a subservient judiciary; since the English Constitution sets no limits to the powers of Parliament. But we had the really novel and wholly admirable idea of protecting ourselves against usurpation of power even by our own government and keeping the fundamental liberties of the people forever in their own hands, protected by their own local courts, exercised in their own town meetings and local legislatures, and guarded finally by the Supreme Court of the United States; so that even their own government, set up only so far away from them as Washington, might not un-

duly interfere with their domestic concerns. For one thing that the English people had learned was that a distant government, albeit benign—Henry VI when in France, for instance, or when too much power was centralized in London—was dangerous to the well-being, if not to the liberty, of the people. The twelfth and thirteenth centuries are a continual struggle to keep power where it belonged—in the people's councils, not in the will of the King; in the county courts, not with the royal chancellor. As Taswell-Langmead tells us, the great original principle of the English judicial system was that of trial in local courts properly constituted—trial *per pais*, in the presence of the county, as opposed to a distant and unknown tribunal. Therefore we were as careful to protect ourselves from excess or abuse of power on the part of the central government as we were to give it control of our international relations and of matters essentially of national concern, such as commerce between the States; and later, on a sort of reinsurance principle, by the Civil War amendments, we empowered the central government to protect us against the State governments in turn. And that protection runs in favor of any individual or any class, and against government or any branch of it, legislative or executive, State or National, from the President or governor down to the meanest official or the corner policeman; and extends to those home liberties which a thousand years of experience have shown to be, as it were, the irreducible minimum necessary to the Anglo-Saxon people for freedom as they understand it. This

was no accident. It was not their custom to take constitutional statutes ready-made, but to let them grow out of events and the actions of freemen; and though it might seem marvellous that our democracy, a democracy which for the first time in history grasped all the reins of government, legislative as well as executive and judicial, growing conscious of its power actually to *make* laws (for in their earlier days laws grew up as custom, not ready-made, though that custom, when well established, was often recognized and codified in Acts of Parliament), should, as a first step, have taken pains to put this curb upon themselves and so invented written constitutions, State and National—there were two reasons for it; and these reasons are opposite, each one to the other.

The Anglo-Saxon people have a genius for ruling themselves. Their laws are the most ancient of modern law, they extend in unbroken line from Ethelbert, the first Christian king of Kent; at first mere digests of local unwritten customs, handed down by oral tradition, then put in writing to meet the needs of a larger or more centralized state; and our founders had not any doubt of our ability to go on ruling ourselves. But they were doing two things which were novel in the world's history: they were setting up State legislatures with unlimited powers, and they were setting up a remote Federal Government which they were anxious to keep in hand. So the State Constitutions were adopted to control the one, and the Federal Constitution to control the other. Both, of course, set up the

frame of government which they controlled. And the State Constitutions, of the original thirteen States, are older than the Federal, and served in part as a model for it. The framers had two things to consider: they were trying to make a National Government which should be *political* only, that is to say, have to do with the Nation as a whole in its relation to other nations, should look out, therefore, for our peace and protect us in time of war; and also to create State governments, at home, to regulate the social affairs of the people. This distinction should never be lost sight of; much of the confusion of our present politics comes from disregarding it. To State governments were entrusted a man's liberty in relation to other individuals, a man's private property, all regulation of his domestic concerns; to the National Government, as such, the Federal Constitution gave but one power over the States directly—but one right to interfere with them—and that was if they ever ceased to maintain a republican form of government. Short of that, short of their establishing a monarchy or a bolshevism, neither President nor Congress has a right to direct interference with the States as such. Implied powers, granted indirectly as a necessary consequence of national function, they of course have—such are powers over interstate commerce, to protect the mails, or the proper functioning of the Federal courts.

Now these two Constitutions—our State and our National—were the first written constitutions in the history of the world. Rigid, Bryce calls such (for many

nations have adopted written constitutions since), for the English constitution, though based on a certain number of historic documents—which time has added to, and may again add, or suffer some to fall into disuse—is really based on government usage, in the last analysis, public opinion, and is thus *flexible*. And this double safeguard, this pair of written constitutions, State and National, were drawn up, upon their social or *human* side, with ends in view that were almost the opposite of one another. What our forefathers were afraid of in the Federal Government was an aristocratic or autocratic rule, or a remote power which might come to interfere in their domestic affairs. Therefore, the influences which restrained and limited the Federal Constitution were democratic. Most of its restrictions were drawn up by men like Jefferson, jealous of any government which was not direct from the people. The State Constitutions, on the other hand, were rather aimed at protecting the propertied classes from the omnipotent legislatures they were about to create. Therefore, the restrictions in the State Constitutions are mostly imposed on the democratic legislatures in the interest of property or order. It was the propertied classes, the educated classes, who drew up the State Constitutions and insisted mostly on these safeguards; it was the democratic masses who watched so jealously the powers about to be given to the United States Government by the Federal Constitution. Some things they were all united upon; therefore, they appear in both; such are the fundamental principles

with which this book is mainly concerned, those of the Bill of Rights, or Magna Carta itself, most of which appear in the first ten amendments to the Federal Constitution (which are, however, practically coeval with it, as the people of the States would not have agreed to it without them). They grew from five clauses in Magna Carta to thirteen in the Bill of Rights of 1689, when our ancestors had had experience of Stuart tyranny; sixteen may be counted in the Bill of Rights in the Virginia Constitution of 1776; thirty in that of Massachusetts, 1780. Indeed, they grew continually, through all the Confirmations of the great Charter, from 1215, 1354 (Edward III), to the Petition of Rights (1627) and the Bill of Rights (1689), and should be also traced earlier, in the Massachusetts Body of Liberties (1641), through the Habeas Corpus Act (1679), the Act of Settlement (1700), to the Virginia Constitution and our Declaration of Independence immediately following.

It was the people, through Jefferson, who spoke to the new-born National Government and said: "Thus far thou shalt go and no farther." It was the propertied classes, the Federalists at home, who said the same thing to the State legislatures, to whose laws their personal liberties and private fortunes were about to be intrusted. But both the "classes" and the "masses" then wanted these restrictions. During the Revolution we had had disastrous experience of omnipotent State legislatures, as reckless in their abuse of lawmaking powers as the "carpet-bag" legislatures of

the South; and we had also had experience of the futility of a National power which could not enforce its laws upon the States or upon the people thereof. The one Constitution being devised to frame a Nation, the other to organize a State, both were carefully limited; the latter in the interest of the people, the former in the interest of the people and the States. Both, besides setting up a government, were meant to define and protect the people's liberties; but the one rather political liberty, in and from the government at Washington; the other rather personal liberty, for the people themselves and their possessions at home.

So with us, we have no sovereign but the people; not the President, not the Congress, not even the United States Government; while in England the Parliament is sovereign, though, by a fiction, it is called "*the King in Parliament.*" Practically, whatever the House of Commons does is constitutional and right, though it were elected but yesterday. But our people have never parted with their sovereignty, and our courts are here to guard it. And they kept that sovereignty in their own hands, first, in order to guard themselves against any usurpation of the Federal Government; second, to assure to themselves and their posterity the enjoyment of those rights, liberties, and protections which their own history had taught them to be essential. Just how those rights touch each individual, just what forms they assume in actual life, it is the object of this book to show.

Outside the mere frame of government, the great

aim and end of our Constitution was to protect the people's rights, the rights of the whole people, or of any part of the people, or even of one individual as against the people, in such cardinal rights as he is declared by the Constitution not to have given away, as against either Executive or Congress. This is the American idea of constitutional government. Direct democratic government has never yet, in a large state, been tried; republican government we term that which through its elected representatives seeks to enforce the will of the majority; constitutional government is that which also seeks to protect the rights of the minority, to guarantee to each and every citizen or to every class certain essential rights which our history or the written constitution establishes as never to be parted with. These rights we will term cardinal; they are mainly, but not entirely, to be found in the Bill of Rights (in the United States Constitution the first ten, with the Thirteenth and Fourteenth Amendments); and the first, and in some respects the greatest of them, though the hardest to define, is the Right to Law.

NOTES.—In one of the earliest cases before the Supreme Court, it was held that no man, not even the President, is above the law; and a government official who seized a vessel under the express orders of President Madison was found not to be justified thereby. (*Gelston v. Hoyt*, 3 Wheaton, 246.)

"The Constitution is a law for rulers and for people, equally in war and peace, and covers with its shield of protection all classes of men at all times and under all circumstances." (Justice Davis, in *ex p. Milligan*, 4 Wall., 120.) And in the famous case where it was first held to be the duty of the court to refuse to apply an unconstitutional Act of Congress (*Marbury v. Madison*, 1 Cranch, 137), Marshall quoted the words of the Constitution of Massachusetts: "The Government of the United States has been emphatically termed a government of laws

and not of men." No deliverances upon constitutional matters are more often quoted than these; and in a recent case (*Block v. Hirsch*, 256 U. S. 160, 166) Justice McKenna, quoting Davis, added: "The Constitution . . . is a restraint upon government, purposely provided and declared . . . making restraints upon government the rights of the governed. And this careful adjustment of powers and rights makes the Constitution what it is intended to be and is, a real charter of liberty."

So Chief Justice Parker, of Massachusetts, a hundred years earlier: "The people ought to be made to know that, in certain cases, their rights are above the reach of the legislature, and thus popularity may be given to the denial of Legislative power." (Warren, *The Supreme Court in U. S. History*, I, 485.)—Mr. Warren's monumental work will be hereafter cited as "Warren" simply.

"At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen." (*Burdeau v. MacDowell*, 256 U. S. 476, Holmes and Brandeis, JJ., in dissenting opinion.)—Burdeau was a special assistant to the U. S. Attorney-General, and himself guilty of no wrongdoing; so the words quoted are not inconsistent with the opinion of the Court.

"I take it as the highest encomium on this country that the Acts of the Legislature, if unconstitutional, are liable to be opposed by the Judiciary . . . the Judiciary are the sole protection against a tyrannical execution of the laws." Patrick Henry, in the Virginia Convention. (I, Warren, 263.)—It will be observed that radicals as well as conservatives were agreed on this essential point; in fact, all our history shows that this great function of the court has been approved by all, at all times, by persons, States, or parties (so Mr. Gompers in the Kansas rate case just decided, see v. 117), save only when the decision went against them.

"This principle (the supremacy of the Constitution over statute law, and the duty and power of the Judiciary to act as arbiter in cases of any conflict between the two) is wholly and exclusively American. It is America's contribution to the science of law. The assertion of it . . . under the conditions . . . was the deed of a great man." (Beveridge, *Life of Marshall*, III, 142.)

"The Judiciary in our country is essentially feeble and must be always open to attack from all quarters. It will perpetually thwart the wishes and views of the demagogues as it can have no places to give and no patronage to draw around it close defenders. Its only support is the wise and good." (Story, *Life*, I, 411.)

"The first ten amendments," said Marshall, "demanded security against the apprehended encroachments of the general Government, not against those of local governments. Serious fears were entertained

that those powers which patriot statesmen who then watched over the interests of the country deemed essential to the Union . . . might be exercised in a manner dangerous to liberty."—Between 1801 and 1835 there were sixty-two decisions involving constitutional questions, in thirty-six of which Marshall wrote the opinion. (II, Warren, 273.)

State statutes embodying notions of social progress have usually been sustained; 790 such cases were decided between 1889 and 1918, in which State laws were challenged under the Fourteenth Amendment, 422 of these resting on the police power, of which only 53 were held unconstitutional, two-thirds of which were rate cases, and only 14 involved legislation affecting the general rights and liberties of individuals. Under the interstate commerce clause, of 142 cases involving the police power, 46 held the law unconstitutional, but only 13 of these involved general progressive legislation, and in no one of these was there any strong public criticism of the decision. No law is held invalid which has a real or substantial relation to the protection of the public health, safety, or morals, or unless clearly arbitrary and oppressive beyond the necessities of the case. (*Ibid.*, III, 464, 467.)—Mr. Warren's exhaustive study affords a clear answer to those who think that our Supreme Court is a check, and not a safeguard, of progress. Moreover, it has established that there is no doctrine of *stare decisis* on constitutional questions; that is to say, the court will always re-examine them when the same principle presents itself again, thus keeping an open mind and not feeling bound even by its own decisions; and it never considers constitutional questions except with a majority of the court.

"It is the Constitution which is the law, and not even the past decisions of the Court upon it. . . . To the decision of an underlying question of the constitutional law, no . . . finality attaches. To endure, it must be right." (Bancroft, *Works*, Vol. IV, 549.)

"Majority tyranny requires constitutional safeguards . . . as Burke said, 'The restraints on men, as well as their liberties, are to be reckoned among their rights.' " (Warren, *ibid.*, 475.)

CHAPTER II

CONSTITUTIONAL RIGHTS PECULIAR TO ENGLISH AND AMERICAN FREEMEN

The idea that a man has rights behind and beyond the written laws is peculiar to us. The doctrine that there are certain cardinal, or natural, rights of man which no government ought to, and ours cannot, take away is peculiar to us of the United States. The British Constitution does not go so far as this, despite the dicta of Coke and one or two other great English judges that an Act of Parliament contrary to natural justice might be void. But though an early justice of our Supreme Court remarked that, whether this were so or not, there was at least no court empowered to declare it so, every imaginable established "natural" or cardinal right that has stood the test of time in our history is expressed or implied in some phrase of our Constitution. And our highest court has steadily and consistently so held in its decisions, which now extend over a hundred and thirty years.

The first edition of this book bore as a subtitle: "The National Powers, the Rights of the States, the Liberties of the People." As this work will dwell principally on the third, let us consider the people's rights and liberties first. What are they? In the abstract, to have

a republican form of government, State or National; to be guaranteed their local government; to be protected in their cardinal rights (this word seems on the whole better than "natural," as committing us to no theory, better than "historic," for some of our rights are expressed for the first time in our Constitution, and than "constitutional," which is too general and applies as well to political rights or those of States).

What are these cardinal rights? Firstly, and generally, the right to law. The cardinal rights themselves are generally guaranteed, as against the United States, by the Ninth and Tenth Amendments: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," and "The powers not delegated to the United States by the Constitution . . . are reserved . . . to the people"; and, as against the States, by the Thirteenth and Fourteenth Amendments, the former guaranteeing against slavery or involuntary servitude, the latter in general terms protecting "the privileges or immunities of citizens . . . life, liberty, or property . . .," assuring "due process of law" and "the equal protection of the laws." Neither of these two sets of amendments attempts a more precise or detailed description; as Mr. Hughes said, in an argument recently sustained by the Supreme Court,* "the right of a citizen of the United States to reside and work within the bounds of the United States wherever he may choose is a fundamental right pertaining to his individual liberty.

* U. S. v. Wheeler, 254 U. S. 290.

Like other fundamental rights of life, liberty, and property, so far as interference therewith on the part of individuals is concerned, it is a right which the Constitution of the United States leaves to the protection of the several States." And White, C. J., in the court's opinion, quoted the words of Washington (Justice), who said: "What these fundamental principles are, it would be more tedious than difficult to enumerate . . . protection by the government, with the right to possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may prescribe for the general good of the whole."

The right to law, especially, is guarded against the National Government in the Fifth, and the State in the Fourteenth, Amendment. "No person . . . shall be deprived of life, liberty, or property, without due process of law"; "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"; and the attempt to define what is due process of law is almost as difficult, and has filled more books, than that to define what are "fundamental rights." What is this right to law, of which the right to due process is a part?

The great difficulty in explaining this, to an American, is that it is hard to make him conscious of a thing that he has breathed in all his life, and, to a foreigner, a thing of which his past affords no example and of which he has not the slightest conception. We are

not conscious of the air we breathe, but a Martian from another planet would be conscious of it quick enough. The Right to Law, as known to Anglo-Saxon peoples, has no parallel in any other country in the world, nor did it ever have its like elsewhere in any time in history; it is unknown even in such countries as Germany and France, so much so that it is not even understood there by their students; while it is hardly understood by us just because we are so used to it that we cannot understand there being any other system of free society. It is the right of any one, irrespective of rank, office, or station, to appeal in all matters to the ordinary law-courts for trial of any dispute between him and any other person, or body of persons, or even officer of government, and to resist their unlawful actions if necessary with his own hand and appeal to the same courts to justify him; and this applies both to criminal and to civil matters, and to any infringement, by any person or any potentate or functionary or any board or commission, acting under whatever authority, upon the civic or fundamental rights of the individual. In Germany, if anybody injures you under pretense of government authority, be he an Emperor, an official, a soldier, or a mere policeman, you cannot resist and you cannot sue in the ordinary courts. They are above the law. But in England, as with us, nobody is above the law; there is no "Administrative Law," no peculiar *corpus juris* extending to the doings or relations of government and the officials thereof, and to government demands and government affairs, such as exists

in all continental countries. This notion, that the doings of the government itself, or even of the King, in the person of any of his officers, can be questioned by any subject in the ordinary law-courts—conjoined with the right of instant inquiry into the reason or pretext of the detention of any man's person or the seizure of his property even by officers of government—is the principal reason that England has been called free. If a king or a policeman, or a soldier or a tax-gatherer, does what you think he has no legal, constitutional right to do, you can, in the common phrase, *have the law on him*—like most vulgar phrases, it is pithy with exact truth. And, in earlier days, you could protect or avenge yourself, for he was “outlaw”—that is to say, no law protected him from anything you might do in redress. In European countries which derive from the Roman law no such system ever existed. They have a whole body of privileged law, what is called administrative law, devised for the use of government functionaries alone. From this the plain citizens are excluded. But with us, if the President of the United States interferes with your liberty unlawfully, you may resist by force, in proper cases, and always by suit in the courts; if a soldier or a magistrate arrests you without cause, or a commission seizes your property, or a board forbids your right to trade, you can disobey him or them without danger, and bring suit as if he were a private trespasser. And the law you invoke, furthermore, must be the common law of the English people, that is to say, in origin, the body of

their free customs and usages, made by themselves and not the King, in earliest days also enforced by themselves; and still to be enforced by "due process of law"—that is to say, in open trial in ordinary, near-by courts, with trial by jury, in your presence, and all the other attendant rights that the phrase "due process" connotes. And the common law it must be, not the Roman or civil, nor the canon or church, nor any rules of administrators or orders of the King, or a council, or rulings of a board or commission. Mandarin law—so we may call it—is hateful to our race. So every English freeman was, every present American citizen is, entitled to *his law*—to have his rights tested in his own courts, not in remote, still less before other kinds of government tribunal, commissioner, or censor. Violation of this principle by the King was one thing complained of in the Declaration of Independence: we were made to stand trial in England, where we could not bring our witnesses nor have the judgment of our neighbors—it is still a cause of complaint, when litigants are improperly compelled to go to Washington, or from State to Federal courts, or submit to the ruling of a board, or censor, or commission.

This right to law, as against anybody, and to equal law with anybody, was established in England as early as under the reign of Saxon Edgar, re-established, against Norman kings, under Henry II, and is still the cardinal difference between the rights of an English citizen and those of other countries. Of course, with the increasing complexities of modern life, and the

steady multiplication of the functions of government, this right has been vastly curtailed. Bryce said that with the tremendous appointment of government officials, administering new functions, the administrators themselves would build up an administrative law. Already the subject is taught in our colleges. Yet its growth, if we would be true to our traditions, must be jealously watched and sedulously guarded. Many things, in a modern state, must necessarily be done by administrative officers. Yet they must be kept carefully subject to a general law, which they themselves should not, at least in last resort, be allowed to interpret, lest we develop a bureaucracy, a mandarin government, of men and not of laws.*

And underlying this right to law is the tradition, almost forgotten now, that that law is, not the order of a sovereign, but the custom of the people—another fundamental difference between Anglo-American and European freedom. The English notion of law was so different from the later Roman that there is almost no relation between them; it was, the customs or usage of a free people, not originally expressed in any code, and not commanded by anybody except possibly the people themselves; while the Roman and hence the Norman and to-day the continental notion is that it is the command of a sovereign to his subject, necessarily written and made new, *ready-made*, by a sovereign.

* This thesis has been nowhere more passionately defended than by Senator Borah in his article in the *New York Times* of July 2, 1922: "A government from Washington by commission . . . is no different from a government by satrapies from Rome."

Though that sovereign cease to be the king and becomes the parliament, the difference persists and is real. Americans should not lose sight of this distinction in their minds. For the true democratic law, and the law that stands the test of time and keeps countries free, is more apt to be of the former kind. The latter is created by the government, to whom its people are subservient; not born of the people, of whom the government itself is the creation. It may bear no relation to custom or usage, to past experience, or even to common sense. It is arbitrary, like an order to a slave; catastrophic, not evolutionary. The first aspect of English constitutional history after the Conquest is the effort of a once free people to re-establish two ideas, the right of everybody to law and the right to law, "as it was in the time of Edward the Confessor"—that is to say, the customs of the free Saxon people, not the orders of a feudal lord. Every Norman king after William was made to promise this in his coronation oath, the laws of Edward the Confessor's time, until Magna Carta came; this included the right to law, with many other rights, so then they were made to take oath to respect the great Charter instead. This itself was so reissued or confirmed thirty-two times between Runnymede and the final Confirmation of Charters under Edward I. Thus William the Conqueror himself, in his charter to the city of London, says, and in Anglo-Saxon: "And I do you to wit that I will that ye two be worthy of all the laws that ye were worthy of in King Edward's day." So, the

Domesday Book itself records the "customs," that is to say, the laws, of various towns and counties. Later charters usually give the inhabitants of a town all the customs and free privileges enjoyed by the citizens of London. And, finally, the great Charter of Liberties issued by Henry II in 1154 confirms their "liberties and customs to all men in the kingdom." The right to law was guaranteed primarily in Magna Carta, Cap. 39, that no free man is to be molested except "by the law of the land"—a phrase far broader than "due process of law," and hence not to be held merely identical with it.

Statutes may of course define this right to law. Thus, in 1309 there is an Act restraining chancery jurisdiction and forbidding arrest or sentence without a jury, a principle revived five hundred and ninety-eight years later in the Constitution of Oklahoma; in 1383 a protest against Roman law and a definite prohibition of it to the courts of England; in 1391, that no man be compelled to answer before a Lord (of matters determinable at common law); so the Bill of Rights, three hundred years later, complains that James II endeavored to subvert the laws and liberties of the kingdom by issuing a commission for a "Court of Commissioners" and that both this commission and all other commissions are illegal and pernicious. And the Long Parliament before had abolished the Star Chamber and all but common-law courts. For, in the eleven years before (1629-1640), the effect of loss of the right to law is perhaps more clearly shown than in

any epoch of modern times. Charles's last Parliament had passed the ominous great Petition of Right, destined to become the Bill of Rights under William and Mary. The Lords vainly proposed an amendment saving the sovereign power to his Majesty, but when the petition came back to the House, Sir Edward Coke, who had recently been disgraced by King James for refusing to tell him what his opinion as justice would be in a constitutional case in advance, led the House to refuse to accept the amendment. "We cannot 'leave' to him a 'sovereign' power," said he, "for we were never possessed of it. In my opinion, it weakens Magna Carta and all the statutes, for they are absolute without any saving of sovereign power. Take we heed what we yield unto. Magna Carta is such a fellow that he will have no 'sovereign.' "

The principal liberty prayed for in the Petition of Right was to be relieved from martial law and from the tyranny of commissions appointed by the King. Wherefore, he called no Parliament for eleven years, and England had to do without a free government. In France they did without a States General for one hundred and seventy-four years. But in each country when the people's representatives were again assembled, it was to do away with royalty and execute the King.

During these eleven years monopolies were re-established and applied to every article of ordinary consumption. Royal proclamations made the law; and the courts of Star-Chamber and High Commission, out-

side the common law, by cruel and barbarous punishment, without jury trial, maintained a reign of terror. There were no juries in England and no common law. Everything was done by royal boards and high commissions. And so it went on until the King endeavored to tax the merchants of England without an Act of Parliament, and in like manner to impose a direct tax upon land. Then arose Sir John Eliot and John Hampden, and soon after Cromwell came. But both he and the Rump Parliament soon showed a disregard of the right to law quite as cynical as any Stuart's; and Charles II came back, but only with the Habeas Corpus Act, and then the Revolution brought the Bill of Rights.

As my readers will be impatient of abstractions, perhaps of too much history, I would pause here to note that we have already uncovered the relation of this right to law to three matters of greatest practical importance in our present daily life—what is popularly known as “government by injunction,” government by bureaucracy, and the right of any man to the common law as against anybody, even the government, in his own courts, this carrying with it an implied objection to all censorship or other previous control of his contracts and actions.

The right to the common law was too well established to need much expression in the Federal Constitution. The Declaration of Independence complains (clause 17) that George III “has combined with others to subject us to a jurisdiction foreign to our Constitution and unacknowledged by our laws” and (clause 24)

arraigns him for "abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government." The Federal Constitution recognizes it in the Seventh Amendment of the ten which form our national Bill of Rights, providing for suits at the common law and trial by a jury, and that no fact so tried shall be otherwise re-examined in any court of the United States than according to the rules of the common law. And many State Constitutions declare the people entitled to the common law of England. The Declaration further (clause 23) complains of the King's "transporting us beyond seas to be tried for pretended offences," and the earliest State Bill of Rights (Virginia) provides for trial in the vicinage. Finally, the Federal Constitution (III, 2) provides that all trials be held in the State where the crime is committed. The same principle applies in civil cases. Cap. 40 of Magna Carta applies as well to civil matters, slightly expanding the demand of the Barons (clause 50) "that justice shall not be sold nor deferred nor forbidden"; which is further expanded in our State Constitutions into the phrase: "Every person ought to have a certain remedy at law for all injuries to the person, property, or character, and to obtain justice freely without being obliged to purchase it, completely and without denial, promptly and without delay." It is noteworthy that this clause was left out of the Federal Constitution—because our forebears did not contemplate that government as concerned with a man's private affairs.

That this right to law must be equal, in all men, was established by the Charter of Liberties of Henry II as extended to all persons except actual slaves, even to the villeins. "By 1485," says Hallam, "the principle that all officers, administrators, or soldiers are liable at the common law for their acts, that is, the prohibition of the Continental Administrative Law, had been fully established"; in 1566 Peter Wentworth told Speaker Onslow that the King (Queen Elizabeth) was subject to the common law, and got committed to the Tower; yet Hooker in his *Ecclesiastical Polity* (1593) lays this down as an axiom. Combinations of men are of course equally subject, so there should be no class legislation, for instance, respecting or exempting from the common law labor-unions or farmers' combinations or agricultural "trusts." Martial law, military judgments or courts are objectionable as counter to this law, as was bitterly complained of in the Petition of Right presented to Charles I in 1627. This principle was much questioned both during the Civil War and as to whether any "war power" justified the espionage acts and the prosecutions of pro-Germans and draft-dodgers in the Great War. But the principle of equality appeared more definitely in American constitutional documents than as the mere right to equal law; in the famous phrase of the Declaration that all men are created equal; and, nearly a century later, in the equal protection of the law clause of the Fourteenth Amendment.

The idea of equality was of course very strong at

the time of our Revolution, and still greater at that of the French; de Tocqueville points out that in an extreme democracy it is apt to be valued more than even the right of liberty itself. Democracies, and particularly legislatures representing them, will sacrifice individual rights and impose very tyrannous laws in the aim of a fancied equality. The word appears, for the first time in any constitutional document, abstractly, in the Declaration of Independence. But this only says that men are *created* equal. And equality before the law—not social or even political—was indeed an English principle almost as old as any we have. Tacitus said the Teutonic people were divided into three classes—nobles, freemen, and laborers attached to the soil—but if these villeins were not equal before the law, they soon became so, in England. Fines for killing them were unequal, but so they were as between English and Normans; the man himself had an equal right. There was never any right of life or death, or seigniorial privilege or special service due the lord, as in France, or right to be above the law, like the right to kill one bishop a year, as the Duke of Alva had, by pope's bull, in Spain.

Equality before the law was the British constitutional principle; and we have added to it equality of opportunity: The equal right of any man to engage in any trade or business with as good a chance as anybody else and to be protected from any confederation, "combine," or combination in restraint of trade or his own rights, or from any "trust"; still more, against any sort of special

privilege granted by the State or by the Nation; all public service to be open to all men equally without distinction of rank or station; no "concession" or permission of government to be required for going into any lawful business; no charter of monopoly to be granted or allowed; and most of all, no class legislation; and the State Constitutions saw to it that education be open to all; and equal schools provided. These are American principles.

NOTES.—In the case of the heirs of General Robert E. Lee (*United States v. Lee*, 106 U. S. 196), the Supreme Court ordered to be restored to his son the estate of Arlington, a property of 1,300 acres taken from his wife during the war under an irregular tax sale and then in the possession of the military authorities of the United States. Justice Miller said (p. 220) in the opinion: "No man in this country is so high that he is above the law. . . . Shall it be said . . . that the courts cannot give a remedy when a citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without lawful authority, without any process of law and without compensation, because the President has ordered it and his officers are in possession?"

And in 1920 the Supreme Court refused to interfere with the conviction and sentence to death of a man who had been a soldier and was tried in the State courts of Alabama for a murder committed there while on duty as a soldier upon a civilian; holding that the Articles of War, though amended in 1863 so as to include military jurisdiction of capital cases, do not and cannot replace the jurisdiction of the local common-law courts. (*Caldwell v. Parker*, 252 U. S. 376.)

CHAPTER III

THE RIGHT TO LAW AS BEARING ON PRESENT PROBLEMS: RACE, SEX, AND LABOR QUESTIONS

The right to law in the Federal Constitution does not necessarily include the right of trial by jury or to a unanimous verdict in cases in the States, where an equal and not arbitrary administrative procedure is provided, at least so far as the United States is concerned,* though the rule is otherwise in United States courts where the Seventh Amendment holds; and this exception to ordinary due process of law is rapidly extending with the growth of administrative boards and commissions; but the same thing is not necessarily true under the State Constitutions, many of which, as well as the State courts, are more conservative than the Federal Government in constitutional matters. This distinction, endlessly confusing to the foreigner, is of course due to our dual government. The Federal Government, originally and primarily concerned only with foreign affairs, was naturally not so much troubled with an individual's constitutional rights at home; not until the Fourteenth Amendment did it have to be,

* *M. & St. L. R.R. v. Bombolis*, 241 U. S., 211; *Mountain Timber Co. v. Washington*, 243 U. S., 219 (in personal injury cases; but four justices dissented); *N. Y. C. R.R. v. White*, *ibid.*, 188.

and even then it interfered, in matters happening within the States, always as it were with a burden of proof against it. But the right to law does include a fair and open trial in common-law courts of the neighborhood and in presence of the accused. Only a few States, mostly Southern, permit a change of venue, that is, a trial elsewhere than where the offense is committed; in South Carolina when an impartial trial cannot be had in that county; in New Hampshire only in case of insurrection! So the Herrin murder cases had to be tried in that county. In the Frank murder case,* tried at Atlanta, Ga., amid a race prejudice almost amounting to riot both within and without the courtroom, his counsel were afraid to have him present when the jury came in to give their verdict, and later they asked for a habeas corpus from the Supreme Court of the United States to set him free on this ground. It was refused on the ground that he himself had waived this constitutional right. Justices Holmes and Hughes dissented, however, on the ground that he had not had his full right to law when proved that the court was terrorized by a mob. And in the Arkansas negro murder cases decided this year the court came to an opposite conclusion;† where it was shown that in the trial before the State court the negroes had had no fair chance to produce evidence and had no cross-examination and were imperfectly represented by counsel, and that local prejudice and excitement was such (herein

* *Frank v. Mangum*, 237 U. S., 309.

† *Moore v. Dempsey*, 260 U. S. (Feb. 19, 1923).

just opposite to the Herrin affair, occurring the same year in Illinois) that no juryman's life would have been safe who did not vote for conviction, and that no negroes were in fact in the jury, the Supreme Court held (McReynolds and Sutherland dissenting) that the Federal district court should have given a habeas corpus on the ground that the negro prisoners had been denied their right to law.

The protection of this principle of the Constitution is chiefly invoked to-day in two great matters: in labor disputes, in the claim voiced by organized labor not to be subject to the injunctive process of chancery; and in general business affairs, the desire of all private interests to be free of control, regulation, or preliminary licensing, by administrative boards or commissions. A résumé of recent actual decisions on this subject will make clearer what I mean than pages of abstract discussion. (The question of the regulation of *rates*, charges, and prices rather concerns the constitutional principle respecting *property*, and will be treated of later.)

The constitutional principle of *equality* before the law or otherwise—which is but an American development of the general right to law—has also come up principally on two great subjects also: the rights of negroes and the rights of women. Let us take the former first.

The Thirteenth Amendment (adopted December 18, 1865) against slavery is to-day only active in peonage cases, and will fall better therefore in our chapter on

liberty rights. Attempts to bring under it matters of simple race discrimination have steadily been discountenanced by the Supreme Court. The Fourteenth Amendment, however (adopted July 28, 1868), avowedly passed in the interest of the negro, is still frequently invoked on his behalf, although it has had an unexpected play upon general liberty and property rights, by bringing them under the ægis of National as well as State protection. Let us confine our consideration at present to the race question. Undoubtedly the radical Republicans who passed the amendment expected to bring the negro under the protection of the National Government in all matters affecting him, social or property rights as well as political. To this end the Civil Rights laws were almost immediately enacted by Congress. One by one they were all held unconstitutional, not justified by the Fourteenth Amendment, which only extended the National powers in this particular to actions by the States, not by individuals. For this reason the prime purpose of the radicals fell down. The National Government could not come into the States and compel hotels, restaurants, theatres, sleeping-cars, omnibuses, even railroads, to conduct their business in a certain way. Only when a State statute made an objectionable regulation, or an official acting as and for the State, could the Federal Government interpose to protect the negro. The important question of all was the question of courts and juries, next that of voting. Under the amendment the Southern States could not prevent a negro from holding

office; but they could, extralegally, prevent him from being elected, and they sought, by actual statute, to prevent him from voting. Therefore, Congress passed further laws making criminal interfering, or combinations to interfere, with such rights.

Now, it is a curious legal fact that government can make a crime of things which it has otherwise no constitutional right to control. Just how far this power goes is a constitutional question which becomes peculiarly important in our country when we are considering the limits to the Federal, as distinguished from the State, power. Obviously, for instance, the Federal Government cannot make criminal the marriage of first cousins. The thing prohibited must bear some relation to some National power given to the Federal Government by the Constitution. But the last section of the Fourteenth Amendment to the Constitution (it must always be remembered that any amendment to the Constitution is of just the same force as an original article) did give Congress "power to enforce, by appropriate legislation, the provisions of this article." Probably they would have had it anyhow. But under this direct authority some of the National statutes protecting the negro against persons depriving him of or molesting him (particularly when they conspired, combined, to do so) in the exercise of any right or privilege guaranteed by these two "war" amendments were held proper and constitutional.

The general result was that, while the National Civil Rights Act protecting the negro was struck down,

any State Act was also struck down which on its face aimed at discrimination against the negro. A State law might not provide that no negroes should serve on juries, nor even, on the other hand, that there should be a certain number of negroes on the jury in every case where a negro was tried. (It might curiously be presumed that the same doctrine will apply if any State shall ever presume to require some women jurors—notoriously in such cases less swerved by sentiment than men—on juries to try women defendants.) The sheriff or judge, however, might in practice call only white men on the panel, or steadily exclude negroes, and the Federal Government could not interfere. Isolated acts against a negro presented “no Federal question,” yet a combination to overawe him on his way to vote might do so. Except as the National power over interstate commerce might alter the case, the Federal Government might not provide how a negro should be treated in a railroad-car, and the “Jim Crow” laws of the States even, providing for separate accommodations for the negroes in cars, were, provided such accommodations were to be equal, sustained; but, on the other hand, the railroad must provide such “equal” parlor or sleeping car accommodations for negroes even though there are no negroes requiring them, as the Oklahoma law said.* National statutes aimed primarily at the Ku Klux Klan were held valid, but only so far as they might apply to white persons or negroes equally and in a matter affecting a

* *McCabe v. A. T. & S. F. R.R.*, 235 U. S., 151.

Federal right. An Act of Congress aimed at punishing conspiracy to injure, oppress, or intimidate any citizen in the full exercise or enjoyment of any privilege guaranteed him by the Constitution or laws of the United States is constitutional, and constitutionally extends protection to the right to vote for congressmen and to have the votes counted, though when enacted it was Section 6 of the Enforcement Act and aimed only at the goings on of the Ku Klux against the negroes.* "It was adopted with a view to the protection of the colored race but has been found equally important in its application to the rights of all," said Mr. Justice Holmes, adding, somewhat prematurely, "now that the Ku Klux Klan have passed away." But this should not be taken too broadly; for "privilege guaranteed by the Constitution" we should understand those concretely specified, not those implied, else might the ægis of the Federal Government be thrown over every subject of this book.

The right to vote and the power of the States by laws or administrative action directly or indirectly to exclude negroes from voting was the most important question. By direct action the Southern States sought to exclude them by the so-called grandfather clauses in their State Constitutions and by corresponding laws. The Supreme Court was able for a long time to avoid direct decision of the constitutionality (under the Federal Constitution) of such State Constitutions on this point. For, under our system, even a State *Con-*

* U. S. v. Mosley, 238 U. S., 383.

stitution must be constitutional, nationally speaking. Only recently was the question definitely decided *against* so excluding negroes from the right to vote by a clause in a State Constitution which, though superficially of general application, was intended, and worked in effect, to exclude only negroes. The Oklahoma State Constitution imposed an educational or literacy test on the right to vote (which the Supreme Court held lawful), but exempted from it all those who had the ballot on January 1, 1866, or their descendants. This, of course, only exempted the white man from such test; and although no mention was made of negroes in the article, it was held ineffect counter to the Fifteenth Amendment (adopted March 30, 1870).^{*} Exclusion by administrative officials is more difficult to meet; as when negroes fail to pass a literacy test, because they cannot construe a clause of the Constitution, or negroes or persons of any race fail of admission to a college supported by State funds.[†] The amendment, generally, may not be said to require coeducation of the races, but their schools may be "separate and equal." Amusing, though scarcely germane to race distinction,[‡] was the decision given at the same time that a State law excluding from such colleges students belonging to "frats" or "Greek letter" societies was not counter to the Fourteenth Amendment—a victory for the "barbs."

The latest invocation of the equal-law principle on

^{*} *Guinn v. U. S.*, 238 U. S., 347.

[†] *Berea College v. Ky.*, 211 U. S., 45.

[‡] *Waugh v. Mississippi University*, 237 U. S., 589.

behalf of the negro has been caused by the effort of city ordinances or even State laws to procure their segregation in certain districts of a city. No one would seriously propose to have a Jew quarter, a Ghetto, as was done in the Middle Ages; yet this has been attempted for the negro, nominally in the interest of both races. The case decided was that of a city ordinance of Louisville* which prevented the occupancy of any lot by a person of color in a block where the greater number of residences were occupied by whites, and *vice versa*. It was held counter to the same amendment, in that it passed the legitimate bounds of police power and invaded the civil right to acquire, enjoy, and use property which is guaranteed in equal measure to all citizens. The fact that it applied impartially to both races did not obviate the objection that it deprived of property without due process of law; nor the fact that it was aimed (as argued) at miscegenation bring it under the police power, nor that it was (alleged) to be intended to secure the public peace. And Mr. Justice Day concluded: "Desirable as this is, it cannot be accomplished by laws which deny rights created or protected by the Federal Constitution."

The States have some, and had more, statutes prohibiting or making criminal marriage or marital relations between whites and blacks—aimed at miscegenation—which this opinion seems to recognize as a lawful object. However, as has been said, a State may

* *Buchanan v. Warley*, 245 U. S., 60. It will be noted, however, that this law was held invalid not on account of race discrimination but as invading property rights.

make a crime of anything not secured by the Bill of Rights. Yet it is curious that these statutes have never been challenged by the extreme negrophiles. And a statute discriminating between negroes and whites as to descent of property has been held not unconstitutional.* But it is always to be remembered when we treat of race distinctions as unconstitutional under the war amendments as to negroes that the prohibition is solely against State *laws* bearing the discrimination on their face; or, at most, against actions by State functionaries acting in their public capacity. The Civil Rights cases decided that the Federal Government at least cannot interfere with the actions of individuals, corporations, or even combinations of persons when not aimed directly at some Federal or political (not social) right. Quite recently a negro woman took first-class passage in an American steamer from Boston to Baltimore and return. She was denied seats at the same table as other first-class passengers, and excluded from the best ladies' cabin. She sued the steamship company under the Civil Rights Act; but the court held, in 1912, more generally than even in the original decisions nearly fifty years before, that the Civil Rights laws were wholly unconstitutional, even on the high seas, in presuming to directly control private actions. The matter is of great contemporary interest when we consider the present movement for or against the exclusion of negroes from like privileges in privately endowed universities.†

* *Jones v. Jones*, 234 U. S., 615.

† *Butts v. Merchants & Miners Co.*, 230 U. S., 126.

Coming next to the question of the right to law, and equal law, of women—a constitutional amendment is now advocated which will change the situation in such a revolutionary way that it is hardly worth while to waste much space on past history. If a new amendment is to require that no legal or political right is to be denied, altered, abridged, or even strengthened and increased, to any person on account of sex, as the Fifteenth Amendment does as to race, a mere statement of possible consequences would transcend the limits of this essay. The past history of women before the law may be summarized in the statement that from being regarded as a subordinate being, under ward of the husband when married, otherwise a quasi-ward of the State, she has generally throughout the United States now arrived at a legal status where she has all the rights and powers of men, whether she be married or single; she is treated equally as to liberty rights, and more than equally as to property rights while married or upon divorce or as to control of the children; and in addition to all this has many privileges and exemptions not shared by male citizens, as, for instance, the not being liable to arrest for debt or subject to onerous burdens of citizenship like jury or army duty; and a great fabric of legislation that grew up in the last half of the last century to protect and shield her in social and industrial and moral matters, such as shorter labor hours, prohibition to work in demoralizing occupations or unhygienic or pernicious conditions. But as Spencer pointed out, the cry against an abuse is never so shrill

as when it is about coming to an end; and the more radical feminists seem now determined, by the stern compulsion of a fundamental law, on a line of action which can only be adequately described as "going the whole hog."

The more thoughtful, perhaps the more reasonable if not the more logical, of their leaders would probably content themselves with the present situation, where legislation may give them all their rights and take away none of their privileges; and that is precisely the point at which we have arrived under the decisions of the Supreme Court upon the Fourteenth Amendment. It is of course still doubtful, for instance, whether the hours of labor of an adult freeman in ordinary trades can be limited by law. It was thought "unthinkable" fifty years ago. Yet at that time the Supreme Court of Massachusetts, in a famous if careless and little argued decision, ruled that this might be done as to women in factories. Since then we have gone far, and permitted the limitation of hours of labor by statute to men in occupations where the general health or safety are involved or on railroads under the interstate commerce power, and to women almost generally; but the true test is still very simple: is the statute so controlling the labor of men enacted in the interest of the public health and safety, or merely in the interest of the laborers concerned? If the latter, it is, as to men, unconstitutional. But the United States Supreme Court has held (counter to the decisions of many States) that we can make a discrimination as to women, at least in special

occupations,* without infringing their right under the Fourteenth Amendment, to equal law. But it must always be borne in mind that such laws may nevertheless be held void under the State Constitutions; and some State Supreme Courts have so held, adopting the view that such legislation deprived women of something of their freedom of contract while men retained it, particularly when the State Constitution had a provision for equality between the sexes.

Thus a recent law of California, limiting the hours of women working as chambermaids or otherwise in hotels, and excepting boarding-houses, to eight consecutive hours per day, was held *not* to deprive them of their legal rights under the Fourteenth Amendment, or rather that, as women, they might be specially protected by the State;† and the same was held as to female nurses in hospitals.‡ And finally the United States Supreme Court, two years later, seemed “to go the whole hog” by declaring constitutional, so far as the Federal Constitution was concerned, a law regulating the labor of adult women or men in all “mills, factories, and manufacturing establishments”—which seems pretty nearly general—to ten hours a day, the chief justice, Van Devanter, and McReynolds dissenting.§ But in the minimum-wage case, decided April 9 of this year, the reasoning that women could be specially protected was held by a majority of the court in-

* *Muller v. Oregon*, 208 U. S., 412.

† *Miller v. Wilson*, 236 U. S., 373.

‡ *Bosley v. McLaughlin*, 236 U. S., 385.

§ *Bunting v. Oregon*, 243 U. S., 426.

consistent with the idea of the Nineteenth Amendment—"women are no longer wards of the State," McKenna and the two new justices joining Van Deventer and McReynolds, and the chief justice taking the other side.*

Before that the court had sustained the Adamson eight-hour law applying to railway labor of men,† but this decision was based specially on the constitutional power expressly given Congress to regulate interstate commerce,‡ in a manner to conduce to the public safety; here four justices dissented, but not the chief justice. The matter may therefore, for reasons already described, be regarded as still unsettled. In Australia such legislation has prevailed, but not as against a constitution, for in our sense they have none; and it is curious to see the justices rendering the majority opinion in these cases quote so often the laws of Austria, Prussia, or other autocratic, or socialistic countries like Australia, as if they were a precedent for us in matters governed by the Bill of Rights. However, these cases seem to cover much of indoor in-

* Apparently on the old ground that the health of women was peculiarly a matter of State concern. But since the above was penned, the National Woman's party, in a manifesto issued from their headquarters at Washington, June 27, 1923, have come out for a national constitutional amendment for equal rights of women in all particulars, calling attention to the fact that such a law has been secured in Wisconsin, "but in no other State has the legislature been willing to concede to women complete equality with men. . . . It was the same conservatism in the State legislatures which led to the enactment of the suffrage amendment . . . after women had spent more than seventy years laboring for suffrage in state to state campaigns."

† *Wilson v. New*, 243 U. S., 332.

‡ Art. I, Sec. 8 (3).

dustrial labor, as others do mines and railroads, etc.; and the only field left where a man may work as long as he will would seem to be in the outdoor manual trades, in all indoor sedentary trades or shop employment, and in farm labor and domestic service. These, of course, may still be controlled by unions; and are so in fact, more effectually than by any statute. This matter, except as it concerns females separately, falls properly into the coming chapter on liberty rights.

The question popularly nicknamed “government by injunction” has recently come to renewed consideration owing to the detailed and precise commands of the sweeping injunction recently obtained in the Federal courts by the Attorney-General of the United States acting directly for the Federal Government in the late threatened railroad strike.

The objection to the use of the injunctive process of chancery in ordinary disputes, particularly as a way of preventing or punishing crime or putting down disorder, is centuries old. We have seen that the law to which we can be constitutionally subject must be the common English law—not Roman, nor church, nor military, nor administrative, nor decrees of king or president. Chancery jurisdiction rested originally on the royal power as wielded by the King through his Chancellor (in civil matters) or Justiciar (in criminal). These high officials were usually clerics, hence familiar with canon or Roman law rather than the Saxon common law, which they probably despised. More-

over, they had a priest's desire for power, the habit of granting dispensation; and they pretended to intervene only to mitigate the rigor of the common law or supplement it when inadequate. Hence the phrase, *equity*. For the common law knew only one remedial process, punishment for doing wrong; it could not, as a priest might do, order a litigant to do right. From this Justiciar historically grew the famous court of Star-Chamber, which was abolished by the English Revolution, and which had exercised the royal power of the King to try men for their actions and order their doings in Crown cases, that is, criminal matters, or matters supposed to be criminal. From the Chancellor grew his court of chancery and all our courts of equity. Mitigating or supplementing the somewhat clumsy and uncompromising common law was well and good; but the Chancellor also shared this extraordinary un-English, Norman, and tyrannical power of ordering a free citizen to do something that he did not wish to do; and that power is found amazingly convenient in modern times where it is desired to control the actions of large bodies of men who individually, perhaps, are not responsible in large money damages, or when it is either inconvenient or impractical to exert the remedy of the common-law damage suit in the ordinary or local courts.

For this is another great difference between liberty under our Constitutions, English and American, and liberty as it is understood in other peoples, a fundamental difference between England and Continental countries which began at the very beginning, and de-

parture from which principle is too often still a source of grievance to our laboring classes. Too much has been made of the phrase "government by injunction." But without abandoning the valuable procedure of equity courts which cannot merely give damages for wrongful acts after accomplishment, but can also prevent the doing of them, there is a legitimate objection to stretching this power too far, vaguely felt by large classes of our citizens. This objection really rests on the basic conception of liberty in English law.

For what we may call the Continental notion, derived from the Roman, is that all law rests on the order of a sovereign to his subject, coupled with a threat of punishment if he do not obey; to make a man do something, or not do something. This is still more the Oriental notion; you have only to read your *Arabian Nights*; when one man complains of another, he goes to some caliph or grand vizier who, if he takes his side (after being properly bribed, probably), orders that other man to do, or refrain from, something. But this notion had absolutely no place in the common law of England. An Englishman was a freeman, responsible for his acts; he could be punished for them by the state, or made to pay damages for them by the individual; but he could not be ordered to do anything else. He could not even be compelled to make affirmative restitution, as in an Oriental country, save in cases of theft of a tangible thing on which the injured party might lay his hands; and in criminal cases, though punished, he often kept the fruits of his crime.

In the earliest days of all, when in Saxon tribes each man executed his own law, the "courts," *i. e.*, the assembly of his neighbors, only tried the question whether he was within his right in so doing, and if not, he paid a regular fine, at first fixed by custom, later, and most elaborately, by the earliest written laws we have preserved in England. There was a fixed schedule: a member of the royal family was worth ten times as much as a baron, a baron ten times more than an ordinary freeman, etc. If a man, murdered, was not avenged by his kindred (which they had a perfect right to do, and this traditionally became the "unwritten law" of which our newspapers still speak), the murderer had to pay a fine to the kindred of the person slain. And this principle went down through the minor criminal offenses. So carefully was everything provided for that, as an instance, one Saxon code fixes the "wite" for insulting a woman by grasping her breast! For imprisonment, in those days, was hardly practicable; there were no jails; there was nothing between death and a money fine (for we had not, in English law, the Oriental bastinado or European torture penalty); so no one was ever ordered to *do* anything by court process.

Hence, when the jurisdiction of the Norman King's Chancellor grew up, Parliament continually sought to restrain it by statutes forbidding or limiting chancery jurisdiction and insisting on the administration of the common law only. Statutes against the Roman law are numerous in the fourteenth century; the canon law,

the church law, germane in origin (for both had Roman sources), was definitely ousted by the Constitutions of Clarendon as early as 1164, and church and priests were subjected to the "secular" (common) law, save only as to offenses between the clergy, marriage, sexual relations, slander, usury, and wills. Repeated efforts to do away with chancery courts appear in the Statutes of the Realm, so that the general prejudice against them came by inheritance to our ancestors; some States, notably Massachusetts, for some time withheld chancery jurisdiction entirely, and when adopted, it was in a limited and tentative way; nevertheless, it persisted, and the Constitution provides that the Federal judicial power shall extend to all cases, in law and equity; and Congress in the first Judiciary Act (1789) adopted the full English practice in chancery as then known.

Now, our ancestors objected to it, not only because it did away with the common law and common-law procedure and safeguards—as, for instance, the open examination of witnesses and the absence of juries—but on account of this injunctive process. The use of the injunction to quell disorder or control the action of large bodies of men, coupled with the vigorous use of contempt process, to an even greater extent stirs public opinion to-day. Yet it has very early precedents, going back, like chancery jurisdiction itself, to the first century after the Conquest. It was even used in early days to quell disorder and hence punish or prevent criminal offenses, which is, still more, the usual modern objection to it advanced on behalf of organized labor.

And so, in 1309, Parliament protested by a statute restraining chancery jurisdiction and forbidding arrest or conviction without a jury. But in 1452, after Jack Cade's rebellion, they passed a law providing that in cases of riots or disorder an offender may be commanded to appear in chancery and, if he disobey, the Chancellor may issue writs of proclamation to appear within a month or suffer forfeiture or outlawry.

The modern use of the injunction, however, is always traced to a more recent decision of the English court of chancery, in 1868,* as the first modern instance of the use of the injunction in labor disputes. It has been steadily resisted, and its use has stopped short of its most dangerous extension, that is to say, ordering a man to carry out a contract of personal service; this subject will fall more properly into our chapter on the right to liberty. But it has, since 1868, had vast extension both in England and the United States, due not only to the prevalence of labor disputes and the activity of organized labor, but still more to the inefficiency in many parts of the country of the local courts and of the State police; and, most of all, to our State and Federal system, and to the fact that the Constitution gives the Federal courts jurisdiction of suits between citizens of different States. The employer, railroad or manufacturing or mining company, is always a corporation; generally of a different State than that where the trouble occurs; and this alone gives the Federal courts jurisdiction. So, distrusting the State

* L. R. 6 Eq. 551. *Springhead Spinning Co. v. Riley*.

government or the local police courts, they would go into a Federal court of equity and obtain an injunction for the enforcement of which they could, at last resort, depend upon the entire military force of the United States.

Labor interests object to the injunction, not only because it affects their personal liberty, but their right to law, due process of law, in criminal cases; and this second objection is what principally concerns us in this chapter. For the injunction, originally the highest writ of the royal prerogative in England, being the direct order of the King through his Chancellor, is now freely employed by all Federal judges and (except in the older Eastern States) by judges of all but the lowest State courts. Now, bearing in mind the English principle that the law "sounds only in damages," and that the notion of ordering or even forbidding any act (except under a criminal statute) is utterly foreign to its system, and also the cardinal principle that no fact can be found without the intervention of a jury, we see both the historical reason and the present prejudice of the American people as to the injunctive powers of chancery followed by an *ex parte* sentence to what is in effect criminal punishment made by the same judge who issued the injunction and upon the facts as found by him to show an infringement of the same. The person charged may have had no actual notice of the injunction he is claimed to have infringed; and, if the act charged be criminal, he is in effect found guilty without jury trial, confrontation with witnesses and

all the other safeguards which are embodied in the phrase "due process of law." For this reason the Massachusetts Body of Liberties (1641) and the Oklahoma Constitution (1907) agree in limiting the power of courts to punish for contempt to those contempts which are committed in open court, except, in Oklahoma, after a trial by jury—which is what the radical labor leaders demand. This is impracticable without striking down the whole fabric of equity jurisdiction in trade or labor disputes. Nevertheless, the practice of freely awarding injunctions against what are in themselves criminal offenses is open to objection,* both for the reasons above outlined and because it does away with all usual criminal jurisdiction of the local or State courts, discourages or dispenses with the local police power, may render a man liable to be twice tried or punished for the same offense, and, most of all, because it places the labor interests

* "A court of equity has no criminal jurisdiction, but it lends its assistance to a man who has, in view of the law, a right of property, and who makes out that an action at law will not be a sufficient remedy and protection against intruding upon his possession." (*Macauley v. Shackell*, 1 Bligh, N. S., 96, 127.) So *Kindersley*, V. C., in *Solteau v. De Held* (2 Sim. & Stu., 153): "I am not to grant an injunction to restrain an illegal act merely because it is illegal. I cannot grant an injunction to restrain a man from smuggling, which is an illegal act." Nor could he for any merely criminal or penal offense. (This matter is more fully discussed in the author's *Handbook to the Labor Law of the U. S.*, p. 318.)

In the famous *Gompers* case (233 U. S., 605) the question arose whether disobedience to an injunction was in itself a criminal offense; for if so, the defendants, who had interposed continual delays and appeals to a sentence of imprisonment imposed by a District of Columbia court, might plead that the three years of limitation imposed for prosecutions of ordinary offenses by Federal statute had elapsed since the latest act of contempt on which their sentence had been based. *Gompers* and his associates had openly defied and disobeyed an injunction of court forbidding them to carry on a boycott against the Buck Stove

in direct antagonism with the courts themselves.* Notably is this true in the very common case where a punishment for contempt is demanded by a court receiver, who is himself regarded as an officer of the court. And if it be a district attorney or attorney-general, that direct antagonism is invoked against the government. It tends to make the courts no longer judicial, but in effect part of the Executive branch of government. This is the sense of the popular phrase—and most popular phrases have some sense—"government by injunction."†

What the labor leaders would prefer to any regulation of it would be the abolition of the entire use of the injunction in labor disputes with the consequent punishment for contempt, just as we shall find (Chapter VII) that they desire the common law of conspiracy made inapplicable to them as it has been in England. But in our country the principle against class legislation prevents the latter, just as that of equal protection of the

and Range Company, the plaintiffs; and government counsel pleaded the usual argument of the labor side, that such disobedience could not amount to a crime because for a contempt they were not entitled to a common-law trial. But the court, speaking through Holmes, intimated that it might be a crime, stating that contempts had early been punished by criminal process in England. Mr. Gompers got off, as everybody doubtless hoped he might; but the decision might well have stood on an early penalty case alone. To hold ordinary contempt a crime is in many ways dangerous, and seems counter to the language in the opinion in the Debs case; and in an earlier appeal in the Gompers case the court had carefully shown the differences between ordinary contempts and those which might be called criminal. (*Gompers v. Buck Stove Co.*, 221 U. S., 418.)

* *Debs v. U. S.*, 158 U. S., 564.

† See U. S. Senate Report 827, 54th Congress, 1st Session, p. 116, for the earliest discussion of this subject.

law prevents the former. Equity jurisdiction is a right guaranteed in Federal courts under the Constitution expressly; and, anyhow, to exempt one class of litigants from, or to deprive others of, its procedure, would not be "equal protection" under the Fourteenth Amendment; and this phrase has been held to be broader than the due-process clause of the Fifth. Such legislation has recently been tried, in the State of Arizona, denying the issue of injunctions in case even of violent picketing, etc., in labor disputes. There was a strike in a restaurant, with resultant boycott, parades in front, and consequent loss of business; but though a common-law injury and conspiracy was shown, the statute precluded the restaurant-keeper from getting an injunction, which in cases other than labor disputes would have been awarded. The court, by a majority decision, said, through the chief justice, that this clause (the equal-protection clause) is broader than the due-process clause and is a distinct guarantee against unequal or class legislation. "Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class."* Pitney and Clarke, Brandeis and Holmes filed three dissenting opinions.

Our conclusion must be, first, that as the injunction is used primarily to protect a property or liberty right

* *Truax v. Corrigan*, 257 U. S., 312.

of an individual, it should not be made an instrument for the preventing or punishing of crime, although there be many cases when the acts enjoined against may be wholly or partly criminal; second, that punishments for contempt of an injunctive order should be carefully inflicted, after hearing both sides, and be made lighter than the punishments of the criminal law for the acts complained of, the imprisonment, when imposed, never to extend beyond the emergency or danger of irreparable injury which must always be the basis of an injunction; third, that the appearance of government in a suit, by direct action of the attorney-general, is always open to many objections, despite the ancient English precedent and the direct authorization of the Sherman Act and similar ill-considered legislation.*

* The best legal opinion holds that the Antitrust Act should have been drawn merely to apply the common law (which it merely codifies in the parts which have survived the Supreme Court's interpretation) to matters of interstate commerce. And it might have been better to have preserved the common-law procedure throughout, whereby it is the individual injured who brings suit, rather than the government through a district attorney; for the fact that the suit is brought by the government makes of it, logically, a "crown case." If this were fully recognized, the labor interests would get what they ask for, constitutional protection, and the trust magnates ("guilt is personal") might, it being recognized as a criminal matter, more easily be sent to jail.

But the individual injured was not entitled to an injunction under Sec. 4 of the Sherman Act, before it was modified by the Clayton Act, although a conspiracy to restrain interstate commerce was shown, because it was not aimed directly at him, and under the Act the government alone could ask for an injunction. (*Paine Lumber Co. v. Neale*, 244 U. S., 459; *Pitney, McKenna, Van Devanter, and McReynolds* dissenting from *Holmes's* majority opinion.) Although not a constitutional question, the division was so close that we may possibly anticipate a reversal on this point; but anyhow the injunction can only be awarded to control a direct injury to the plaintiff; he cannot enjoin the trust from acting generally, or attack it and defend against it as an illegal body, as could have been done against an unlawful monopoly in the

But when government does appear as a party, the injunction asked for should be couched in abstract terms, and refrain from specifying a mass of orders, some of which are a mere injunction to refrain from crime, and others, in their unnecessary detail and multiplicity, run the chance of encroaching on the constitutional rights of the individual. Daugherty's injunction was bad in these particulars. For all injunctions are in fact framed by the party litigant, as the labor interests well knew, and here the party litigant was the United States. When National interests are involved, as in cases of obstruction to the mails or interstate commerce, it is far better for the government to interfere by direct action, using its marshals or army to protect and enforce its constitutional pow-

time of Queen Elizabeth. (See the Great Case of Monopolies, p. 146 below.)

Furthermore, the Sherman Act gives to the government most extraordinary powers without the ordinary constitutional safeguards; and the mighty engine of government prosecution was placed in the hands of government officials, its use dependent on their will or choice, not on the public injury or private complaint. If we ever had an unscrupulous, partisan administration, such a power, even the power of visitation and inquisition reposed originally with the Commissioner of corporations, might be wielded with terrible effect. (See more fully in Chapter VII.)

But the office of this commissioner, thus animadverted upon in the first edition of this book, has since (1914) been abolished and its powers transferred to a non-partisan "Federal Trade Commission," having five members. They may institute proceedings to prevent unfair methods of competition in (interstate or foreign) commerce, require reports and information, and, if disobeyed, institute proceedings in the Federal courts. At the same time, the remedies of the Sherman Act of 1890 are preserved, under which the District Attorney (Sec. 4) under the direction of the Attorney-General may and shall proceed; and the courts may refer the case, if claim for relief is sustained, to the Federal Trade Commission as Master in Chancery "to suggest an appropriate decree."

ers, meanwhile affording stern protection to the persons or interests injured, guarding with every soldier in the land the rights of the individual to labor and liberty, and not descending, as it were, to be a party to the dispute. Government should not descend to parley with either employers or employees as if it were an equal contracting power only, but hold itself sternly above both and insist on the law of the land. Had it done this in 1922, neither coal strike nor railway strike would have been formidable. But contempt of a contempt process, when successful, brings both court and government, when a party, into contempt.

CHAPTER IV

OF MILITARY LAW, ADMINISTRATIVE LAW, WAR POWERS, ALIENS, AND ENEMIES

There is no such thing as martial law known to the English system of jurisprudence in time of peace. In time of war it can only exist in the enemy's country; or, possibly, in country occupied by him, when the courts are closed and ordinary civilization has ceased to function. For martial law means no law at all—just the will of the nearest military officer. It has never been sanctioned nor recognized by English-speaking courts or legislatures. The phrase, the threat, is of course frequently used; but it is a mere bluff. There is, under the Constitution, no such thing; nor has any officer, civil or military, power to declare it.* Nevertheless, a bluff can be of considerable effect, particularly if it have public sentiment behind it, as when the mayor of San Francisco proclaimed

* Some State Constitutions have thought necessary to express this principle. In Tennessee, martial law is declared inconsistent with a free government, and is not "confided" to any department of the State. In many others, no person can be subjected to it except soldiers and sailors in actual service. But in Rhode Island, probably as a consequence of the Dorr rebellion, it may be employed "when occasion necessarily requires it." So, it seems, even in Massachusetts, the legislature may authorize it. So, suspension of the writ of habeas corpus (which amounts to much the same thing) may not be proclaimed except by the legislature.

martial law at the time of the earthquake, or President Lincoln suspended the right to habeas corpus at the time of Civil War, or the governor of Louisiana recently in Morehead parish. Military law is, of course, quite a different thing; but that applies only to the governance of the army and the rules of its conduct as to others. Military courts, except for the army, are impossible, save as a military measure in enemy country. The army itself can only be kept alive, in English-speaking countries, by repeated enactments of the civil authorities, one or at most two* years at a time. Thus the danger, both of standing armies and of a military autocracy, like to Prussia's, is prevented. Needless to say, that is not the European view; and German militarism placed a soldier's law above all others.

The right to bear arms is also quite a different thing; but that is just the opposite idea to a government army, and was meant to prevent it.

Modern English history may almost be said to be based on this conflict of ideas. The Stuarts, copying Louis XIV, wished to have a standing army at their orders. Down to their time there had hardly been a paid soldier in England, save possibly the "beef-eaters" in the Tower of London. Italian and German ("Brabazon") mercenaries were first employed in 1449, to suppress Jack Cade. To the absence of permanent paid armies most historians attribute the preservation of English freedom and parliamentary government.

* U. S. Const., I, 8, 12.

Martial law and military courts were among the principal things complained of against Charles I and II; it is the matter most harped upon in the English Bill of Rights, that the habit of Charles II was to try people by martial law "contrary to the laws of England"; and the objection to the use of the army to establish military tribunals or to overawe the people is apparent in a long range of constitutional documents and statutes. The great principle is that the military must never be independent of or superior to the civil power.

The establishment of militia, for the defense of local liberties and the maintenance of order, rests on a different basis. It was the ancient defense of the realm, and we find it revived only seventeen years after the Conquest. Its support is intrusted to the legislative branch, and so now in both our National and State Governments, the command only being intrusted to the Executive. But his use of the army is carefully limited to definite emergencies (invasion, insurrection, etc.) and, as between the State and the Federal power, the President cannot employ the State militia but in a National emergency, nor Federal troops in a State except when requested thereto by the legislative authority thereof or the governor when the legislature is not in session—save, indeed, where necessary to maintain the functions or support the officers of the Federal Government; and then he may act without the request or even the consent of the State governor; or when the State government ceases to be republican in form. But of that the President, or perhaps Con-

gress, must be the judge, for it is a political question and, as we have already said, it may not be litigated in the courts.*

The right to bear arms was inherent in the English people; in fact, under early laws, compelled. The barons were required to support their King in war. But they early complained at being led out of the kingdom, and King John's insistence upon this was the principal cause leading to Runnymede and the Great Charter. Both these principles were invoked by our government and by individuals in the Great War,† the former for, the latter against, the draft. The right to bear arms does not carry the right to have concealed weapons, nor to create or drill organized military bodies.‡ These rights are all expressed in every American constitutional document, as well as in all the State Constitutions. The use of private soldiers or armed guards (such as, in modern times, "Pinkerton" men) has always been objected to. In ancient times they were called "retainers," and many

* *Luther v. Borden*, 7 How., 1. See *infra*, pp. 161, 162. So the question whether direct legislation by the people (the initiative and referendum) is denial of a republican (representative) form of government is to be decided by Congress or the Executive; the courts will not presume to say that it is not. Four justices, however, dissented; so the question need not be regarded as settled. (*Mountain Timber Co. v. Washington*, 243 U. S., 234; *Davis v. Ohio*, 241 U. S., 566.)

† Thus, the principle of compulsory service was sustained and acts of Congress to protect it upheld in the *Goldman Case* and others. (245 U. S., 474.) And the *Selective Draft Law Cases* decided that it is no right of liberty to be exempt from bearing arms in defense of one's country even though outside its boundaries. Further, that those most fitted may be chosen, and that by an administrative officer. (*Ibid.*, 366.)

‡ *Presser v. Illinois*, 116 U. S., 252.

statutes were directed against them; the court of Star-Chamber was given power to suppress such "maintenance" and prevent the assemblies of private "retainers" of powerful persons, much as a modern injunction is directed against a mob of strikers; and there are precisely similar constitutional provisions expressed in some of our Western States.*

The Constitution of Wyoming provides that no flag other than the United States flag shall be carried. State flags are still commonly used in the Eastern States, and, of course, by the militia of all. But the red flag never; it denies all that the Constitution stands for except bare individual liberty.†

There are laws against the immigration of anarchists, and many judges have refused to naturalize avowed socialists; these laws are constitutional, for it is historic international, as well as English, law that a country may forbid immigration at its will and permit or withhold naturalization, even arbitrarily; and the institution of private property as well as a republican form of government is guaranteed by the Constitution and promised in the Declaration of Indepen-

* "No armed person or bodies of men shall be brought into this State for the preservation of the peace or the suppression of domestic violence, except upon the application of the legislature, or of the Governor when not in session," etc. Similar *statutes* exist in other States, including Illinois. Their constitutionality does not seem to have been questioned save by President Roosevelt in the case of Oklahoma.

† Nevertheless, it is probable that partial socialism may be enacted in the States without infringing, at least, the Federal Constitution; with State Constitutions it may be otherwise. Those of Washington and Utah expressly protect individual rights; but that of Oklahoma expressly authorizes the State to engage in any business except agriculture. See *infra*, p. 119.

dence. The indictment and conviction of a socialist for failing to register under the Selective Draft Law was recently held to be not invalidated by the fact that no socialists were on the jury, and that counsel had been refused permission to ask the jury before challenging whether they distinguished between socialists and anarchists.*

The principle against military or martial law received, of course, its greatest strain during our war between the States; the Great War, not being conducted in our country, only touched, as above described, the principle of military service. Yet in Civil War times, even when it was Lincoln who transcended, our Supreme Court, even to the very justices he had appointed, defended the principles of civil liberty. It was Taney who held that the President himself could not suspend the writ of habeas corpus; but Chase, Lincoln's appointee, and Davis, his personal friend, rendered the later decisions to the same effect, guaranteeing the individual even in war-time against the exercise of arbitrary power by the Federal Government. "It is eminently proper that a government which is fighting to maintain the integrity of the Constitution should interpose no arbitrary action to suspend or interfere with rights plainly guaranteed under it." † And in a famous case the court, through Davis, unanimously held that no man could be tried by a military tribunal though it were created by the President's order, in a non-seceding State; and five of the

* *Ruthenberg v. U. S.*, 245 U. S., 480.

† 3 Warren, 94.

justices thought the same thing would be true of a military court instituted by Act of Congress. "Our fathers . . . knew . . . the nation they were founding . . . would be involved in war . . . and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb. . . ." * But the decision was received with fury by those radicals who wished to deprive the entire South of the common law and civil government and set up military tribunals or bureaucracies like the Freedmen's Bureau instead, or to put ordinary constitutional rights, especially of the negro, under the special protection of government courts or armies, still more, of potentates or commissions unknown to the common law. "Even the trial of the assassins of Lincoln might be held illegal, as being by a military tribunal." † These fears were indeed realized; the State of Mississippi ‡ by a suit in the Supreme Court sought, though vainly, to restrain the President from carrying into effect an Act of Congress establishing a military government in that State; the congressional government of Georgia § as well was sought to be overthrown; and universally "carpet-bag" or per-

* *Ex parte Milligan*, 4 Wall., 2, 125.

† 3 Warren, 152.

‡ *Mississippi v. Johnson*, 4 Wall., 475.

§ *Georgia v. Stanton*, 6 Wall., 90.

sonal government under orders of Congress was challenged. Thirty years later, the same question arose as to our method of governing the Philippines, and was only avoided by holding that our Constitution did not extend there. But in the dangerous days after the Civil War the court at first evaded the question on the ground that these were political questions and as such not justiciable in a court, like the origin or existence of a State, the existence or justice of a war, the validity of a revolution, the title to office of a Mexican president—and it was not until 1868, in the case of the State of Texas, that they decided that despite her attempted secession she had always remained a State of the Union and as such subject to the Constitution and its laws.* So, fearing that the Reconstruction Acts would be held invalid, the radicals introduced a bill in Congress requiring that the Supreme Court might not declare any Act of Congress invalid unless two-thirds of its members, or even all, concurred, but it was then dropped amid universal disapproval.† As a matter of fact, the usage is that a majority of the full court must concur, which is often two-thirds of those actually sitting, and a decision can be easily reversed. “No constitutional question is ever settled until it is settled right.” But such an amendment is now again proposed, and will be discussed in our last chapter.

The rights of enemies, in war or otherwise, do not come within the scope of this book; enemies cannot directly invoke the constitution of a country with

* *Texas v. White*, 7 Wall., 700.

† 3 Warren, 171.

which they are at war. Yet, as bearing on the German conception of military law, one may note the impudent attempt of a German officer, Van Horn, who had blown up the Vanceboro Bridge between Maine and New Brunswick during the war, but before we entered it, to escape from our custody by habeas corpus while under trial for carrying explosives contrary to law, on the ground that Germany was at war with Canada and hence the act, being done under military orders, must be all right! A justification which one of our own soldiers could not have pleaded in a neutral country, had we been at war.*

The rights to law of aliens, in general, are that they have all liberty and property rights; but not political nor other rights which depend on citizenship or taxation of citizens, as they perform no civic duties. For instance, they may not require (though it has never been denied, except in California) the States to admit their children, not born in the United States, to the public schools. (If born *in* the United States, the children are of course citizens.) Have they equal social and economic rights? Can they seek government employment on equal terms with citizens, insist upon, or be excluded, like the negroes, from equal treatment in public institutions or asylums? The matter rather concerns property or liberty rights; their right to law is the same as that of citizens; they may, as Captain Van Horn did, sue out habeas corpus in the same manner, object to exclusion or expulsion from the country except

* *Horn v. Mitchell*, 243 U. S., 247.

under a general law, and assert all property rights, except the ownership of land, from which our States, still, in this particular, sovereign, may exclude them. But their exclusion, or deportation after landing, when ordered, may be based on facts found by a mere administrative officer, without a common-law trial. Against an administrative official one has no common-law rights, and no powers of defense, save possibly bribery! and there are believed to be at this day more than one legitimate American citizen, born in the United States, who are wandering around the world, banished by finding of a mere official, counter to our inherited Constitution, which, in the Habeas Corpus Act of 1679 forbade even transportation beyond the seas—a principle only yesterday vindicated anew in the case of the Irish sympathizers deported to Ireland by arbitrary order of the British Government.

Thus, an Arizona statute requiring private employers to employ only a specified proportion of alien employees was held unconstitutional.* “The right to work for a living is of the essence of that personal freedom and opportunity secured by the Fourteenth Amendment. Aliens cannot be denied the equal protection of the law.” But this does not extend to public employment. The State, acting as employer of labor, may give preference to citizens. A law of the State of New York providing that only citizens of the United States shall be employed on public works, and even that preference should be given to citizens of New York, was held

* *Truax v. Reich*, 239 U. S., 33.

not unconstitutional.* So, a statute of the State of Pennsylvania making it unlawful for unnaturalized foreign residents to kill wild game except in defense of person or property, and to that end making the possession of shotguns unlawful, was held neither unconstitutional under the Fourteenth Amendment nor violative of the treaty with Italy.†

But it is in the vast recent growth of administrative law that we have most largely departed from the principles of our ancestors; and here, more than in anything else, must we depend on our Supreme Court alone to check the tidal wave of bureaucracy and government by commission whereby our most essential liberties are submitted to the regulation, our very livelihood to the control, of some political functionary, without real appeal to the courts. The right to lead freely our own lives, earn our living, pursue our happiness, is under real menace. Not only in the States; still more under the National Government—because there the busybody's desire to attend to every other body's business, to control all men's actions to the pattern preferred by a few, to submit the labor and trade and domestic relations, the education and the hygiene and the rearing of children, throughout all this wide continent of a hundred million people and of all the races and all the religions, to the Procrustean standard that some society in some few States thinks best, can be brought about sweepingly throughout the

* *Heim v. McCall*, 239 U. S., 175.

† *Patsone v. Pennsylvania*, 232 U. S., 138.

land by some Act of Congress that can be justified under the interstate commerce clause or otherwise ranged with those things which are properly the affair of the central government. And this (it may be added parenthetically) without the advantage that our fortunate dual government contains of a previous experiment in that State or States where the conditions most demand or best suit the "reform." (All new laws are called by their proponents "reforms," but Gibbon tells us of a happy age when the proponent of any new law to the assembly of free Romans had to do so with a rope around his neck; if the law failed of passage, its sponsor was at once strangled.) Few of our new movements now content themselves with State lines; they go at once to Washington and work "nationally"—with a permanent lobby—and they naturally prefer a constitutional amendment to an Act of Congress which can be amended if it fail to work.

But this rather concerns our chapter on State and Federal relations; what we here would consider is solely the reason, the human, every-day meaning, of the Anglo-Saxon objection to "administrative" law. It can be summed up in a word—mandarin government. And however much these mandarins—boards, commissions, commissioners, collectors, censors, registries, or other functionaries—are of chosen experts; were they never merely political appointees or members of the six-hundred-thousand army seeking and getting an easy permanence in a government berth, protected there by civil-service reform itself; it would

nevertheless be, and must be always, true that before them a citizen loses all his constitutional rights and becomes postulant in attitude little differing from that of the Oriental before the caliph or the cadi.

Yet one must always recognize that, in the complexities of modern business, with the humanitarian impulses of modern society, and the increasing willingness of democracy to subject all its activities to the control of that society in its organized form, which is the State, a system solely of *laissez-faire* is no longer practicable. Such matters cannot be regulated by common-law courts. A priori, it would even seem wiser to have decisions made by a board of experts, even by a single commissioner, were he trained and incorruptible—always, of course, however, with an appeal to the common-law courts, to the law of the land. The trouble is, however, that the courts will rarely revise the commission's or censor's opinion on matters of fact; it is an increasing principle not to go behind his or their judgment on the *facts*; and usually the facts are the only thing in dispute. It works out, therefore, that a man is deprived of his common-law trial and his common-law rights. Moreover, as Lord Bryce once predicted, just as custom bred the common law, so the usage of administrative boards or officers tends to breed administrative law, which they are naturally the first to insist upon. Nevertheless, no one will now seriously contend that such commissions are not necessary; though its enemies may point out that even the Interstate Commerce Commission, the earli-

est and perhaps the best of them, by regulating rates to a minimum fixed standard, applying equally to all roads regardless of expense of construction, volume of traffic, or risks of the original enterprise, has in its final effect put an end to railway construction in the United States, and reduced the railways already existing to a very inadequate service and that at rates far in excess of those prevailing in 1897, and probably far in excess of those which would now prevail were the railways given a free hand.

But if such commissions are necessary, we must all the more watch carefully their vast increase, and jealously scrutinize the necessity for each one; still more when they are National, and so take away their subject from control by the States and people at their homes. And amazing is the number of such matters already given to some administrative officer or board to control, originally perhaps in the States, but now increasingly to the Federal Government. In some of the wilder South American republics no man can engage in any business without a state "concession"—which, of course, involves state regulation—but even there the state stops carefully short of interfering with a man's own life, his home, his domestic affairs, the care or education of his children; while we are beginning to approach a law which would be repulsive to the inhabitants of despotic countries for its interference with private life and to those of free countries for its interference with private liberties, diametrically opposed to the free law of our English forefathers. The

State makes inquisition into all a man's affairs, busies itself with his business, steps into his home, and the only thing it fails to do is the thing for which it was primarily created—to maintain order and prevent and punish crime!

One must never forget that all these boards and commissions are also charged, either with matters of making new rules, which primarily appertain to the legislatures, or with matters of judgment, which primarily belong to the courts or to other ordinary servants of the people, town officers, county committees, mayors or governors who, by such general "government by commission," are shorn of most of their power and all their responsibilities. For nearly all these boards are in effect lawmaker, judge, and jury in their own affairs; and although there be, in theory, an appeal to the courts from their ukase, it is almost impossible for the ordinary man who has a grievance to get beyond the board or bureau or commission or censor if it decide against him. The good work done by commissions must not blind us to the fact that before them the cardinal constitutional rights of a man disappear as completely as they do before a military tribunal or any body or official who is clothed with unchecked authority. Government by commission is more broadly dangerous to our rights than "government by injunction"; and all commissions, while there is hardly a known instance of any once created being abolished, tend to become narrow, pedantic, or even controlled by the very interests they are created to

control, while ever anxious to multiply their office and extend their sway. That their enormous multiplication is breeding a portentous number of drones, in our States and Nation, is a minor point; but the time looks near when every laborer producing wealth, every American citizen struggling to rear a family, will have to carry at least one government inspector or commissioner or revenue or inquiry officer upon his back.

Against this principle our ancestors fought with Norman kings; their victory was entabled in the great clause in Magna Carta we may well quote here: "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or of his liberties or of his free customs, or be outlawed, or exiled, or otherwise destroyed; nor will we go upon him, nor will we send upon him, but by lawful judgment of his peers or by the law of the land"—and this means the common law, in an open court, with a jury, by judges or officers—"such as know the law and mean duly to observe it" (cap. 45)—not the judgment of any commissioner. The confirmation of Edward III (1354) substitutes for the first time the words "due process of law" for "the lawful judgment of his peers and the law of the land," a change which alone has made possible many modern decisions of our Supreme Court dispensing with jury trial, though it is probable that in Edward III's time the phrases were thought synonymous. Cap. 35 again insists that "the writ called *praecipe* shall not in future be issued so as to cause a freeman to lose his court," *i. e.*, his right to try his cause under the common law.

The canon (church) law had been got rid of by the Constitutions of Clarendon, fifty years earlier than the great Charter itself—with a few exceptions, such as of sexual and testamentary matters; and in 1309 we find the first statute against chancery jurisdiction invading the common law, repeated in 1331 and often since. In 1383 the barons protest against the usage of Roman law, and judges forbid it to be cited in the courts. So that Hallam counts, as one of the six great liberty rights established by the date 1485, that “officers, administrators, or soldiers, are liable for their acts at the common law”; and in 1487 the dispensing power of the Crown was denied as to matters against the common law (*Mala in se*); and Taswell-Langmead calls the resumption by the people generally of their right to be tried in their local courts by their neighbors under the common law, and to have no royal officer or tribunal above it, one of “the three great heads of the growth of the English Constitution from the Conquest until modern times.” So ancient and continuous is the principle against all but common-law government.

As all boards stand between the people and the common law, our fathers had a prejudice against them; they came but slowly, at first with merely advisory powers, and always with full appeal to the courts, both on the facts and on the law. But of late, with us, their progress has been portentous, the courts have usually sustained them in all their powers, and considered their judgments, though without juries or even hearings, “due process of law”; while our Supreme

Court, considering perforce only those limitations contained in the Fifth or Fourteenth Amendment, has refused to interfere in any particular, even to the point of declining to investigate their findings of fact; in effect, therefore, only permitting itself to consider the question whether the Act of Congress or State law creating such boards or commissions is on its face a denial of due process of law; and apparently at present inclining to the view that it may be due process although no appeal to any court is provided for. Surely, our great court cannot be considered too conservative; such an attitude would have been impossible to John Hampden or Edward Coke, radical as they seemed in their time, still more to Thomas Jefferson.

Thus, concerning a law requiring safety props to be applied in coal-mines as ordered or required by a Pennsylvania State commission, it held * that an appeal does not have to be given to the courts where decisions on a matter of public safety are delegated to an administrative board; and the same reasoning would of course apply to matters of public "convenience."

A State commissioner may fix, without appeal to the courts, the premiums to be charged by fire-insurance companies.† A rate of duty fixed by a United States Secretary of the Treasury (under an Act of Congress) is final, and the court will not review his action, even to see whether it conflict with our treaty

* *Plymouth Coal Co. v. Pennsylvania*, 232 U. S., 531.

† *German Alliance Co. v. Kansas*, 233 U. S., 389.

with Cuba,* and although the suit was brought by one of the States (Louisiana, operating its sugar plantations by convict labor). "The court will not review any ministerial duty involving discretion or judgment." (The judgment of a mere court is, however, open to review.) An Ohio statute established a board of censors for the movies, they to permit "only such films as are in their judgment of a moral, educational, or amusing and harmless character." It was held that the freedom of the press did not protect film pictures; and that authority to administer law may be delegated to an administrative officer.† (In this case there was an appeal to the courts provided; but it does not appear how they could find that he had refused to license a film which was, *in his judgment*, of a harmless, etc., character!)

A blue-sky law in Ohio permitted the sale of stocks and bonds only by such persons as were approved by a State commissioner, the only standard specified being "general honesty"; there was, however, an appeal given to the courts, and the law was sustained ‡ on the ground that the prevention of deception is within the competency of government, and if the conditions are within the power of the State to impose, they can only be ascertained by an executive officer. "Reputation and character are quite tangible attributes, but there can be no legislative definition of them that can automatically attach." So, in

* *State of Louisiana v. McAdoo*, 234 U. S., 627.

† *Mutual Film Co. v. Ohio Industrial Commission*, 236 U. S., 230.

‡ *Hall v. Geiger-Jones Co.*, 242 U. S., 539.

Tennessee, a law requiring real-estate brokers to get a license from a State commissioner who must require and procure "proof" of their honesty.* This reasoning leads us far. The "administrative officer," therefore, becomes a sort of superman over judges and juries! A similar South Dakota "blue-sky" law† was sustained at the same time, and one of Michigan,‡ overruling no less than sixteen Federal district courts, whose judgment had gone the other way. The Michigan law exempted those securities "listed in any standard manual of information," and this was held not unduly discriminatory. Trial by jury as well as prosecution on indictment of a grand jury were essential parts of "due process of law" as known to our ancestors; yet both may be superseded by administrative procedure without appeal to any court, where not in terms protected by a written constitution, State or National, at least so far as the Fourteenth Amendment is concerned.§ Thus a law of the State of Washington doing away with all jury trial or ordinary suits in cases of

* *Bratton v. Chandler*, 260 U. S., 61.

† *Caldwell v. Sioux Falls Stockyards Co.*, 242 U. S., 559.

‡ *Merrick v. Halsey Co.*, *ibid.*, 568.

§ Thus jury trial, both in criminal and civil cases, is expressly guaranteed, as to Federal courts or suits, by the Sixth and Seventh Amendments; and such verdicts must be as at common law, *i. e.*, of twelve men and unanimous, but as the first ten amendments all relate solely to Federal action, not the States (*Minneapolis & St. Louis R.R. v. Bombolis*, 241 U. S., 211), laws permitting juries of less than twelve and majority verdicts will not be invalidated under the Fourteenth Amendment, which protects a man only in rights secured by the National Constitution, and leaves to State courts to guard those rights (often, of course, identical) which are expressed in State Constitutions. (*Maxwell v. Bugbee*, 250 U. S., 538.)

personal injury and substituting the judgment of a State commissioner was upheld in the Supreme Court—four justices dissenting.* And railway rates fixed by commissions have been sustained, even though their findings blended legislative with judicial powers, and under a law giving expressly no appeal to the courts. (Such an appeal to the Federal courts has been held always to exist, but only on the point that the rates actually fixed are “confiscatory.”†)

Thus, on an appeal from orders of the Kentucky Railroad Commission, the U. S. Supreme Court decided‡ that such orders of the Commission made under an Act of the State legislature are legislative acts under a delegated power (under older constitutional ideas the power to make laws cannot be delegated), and has the same force as if made by the legislature directly, and is, for this reason, a law passed by the State of Kentucky within the meaning of the contract clause of the Federal Constitution; and, further, that the failure of the law to provide an appeal from the Commission to any court is not an unconstitutional denial of due process of law under the Fourteenth Amendment, as the railroads may nevertheless appeal to the Federal courts on the question whether the rates so imposed are confiscatory (but only on that question; on any other matter—severity of fines or punishment, adequacy of hearing, control of the de-

* *Mountain Timber Co. v. Washington*, 243 U. S., 235.

† This matter will be more fully discussed in chapter on the Right to Property.

‡ *L. & N. R.R. v. Garrett*, 231 U. S., 298.

fendant's action in any other respect—he remains at the mercy of the Commission's orders and their sole judgment as to whether they have been obeyed. "So long as they act within their sphere, the court cannot substitute their judgment as to reasonableness"). And the court ends this unanimous opinion by relegating the railroads to the State courts and the Kentucky Constitution, which "presumably . . . would be open to them for this purpose." The court therefore will not review a board's judgment as to facts; placing, it seems, any commission as a superbody to the courts themselves; for it had just reversed the finding of the circuit court, based on an elaborate report of its own master—but in this case the reversal was to decrease, not to increase, the compensation of the Minnesota railways, by reducing it to the arbitrary rate first fixed by the State Commission of two cents per mile,* per passenger, and correspondingly low minimum freight-rates. It will not escape notice that in all these decisions the Supreme Court has interfered in favor of the more radical view—a fair reply to its enemy's charge of undue conservatism.

* The Minnesota Rate Cases, 230 U. S., 352.

CHAPTER V

THE RIGHT TO LIBERTY

The right to personal liberty is the primal right of Anglo-Saxon peoples, and is older than recorded history, fully developed when Tacitus wrote of the Germans. If the Romans gave to the Western world the notion of law and order, it was the Teutons who asserted individual freedom. Their law indeed was originally individual; each man enforced it for himself; but carefully in accordance with their tribal customs, liable to outlawry and punishment at any man's hand if he infringed. But his personal liberty was so absolute that not only was his person, and later his house, inviolate, but he could not be ordered to do anything, by either a court or a king. This principle we have already had to discuss, when speaking of the chancery power. An Englishman or an American cannot be compelled to do a thing that he does not wish to do, carry out a certain line of action, or perform even a certain service. And indeterminate service, for an indefinite time or even a long time, was considered under English common law to be slavery; the necessary long-voyage contract of a sailor is the nearest to an exception to this rule; and even this has been done away with in the United States by the recent La

Follette Act of Congress. Apprenticeship may seem another exception; but this applied only to minors, and was carefully regulated, and the services required were definite. If a man broke a contract for personal service, he was liable in damages; but could not—and cannot—be compelled to render the service. But he was responsible for his actions, if criminal, originally to the person injured only, but finally to the State, which with the growth of civilization learned to look upon murder or theft as a public wrong. And it is by the device of making breach of contract to do work a criminal offense that some of our Southern States have sought, in their so-called “peonage” laws, to evade the general principle.

The right to liberty includes, firstly, the right to life. This needs no explanation, and it is enjoyed by the people of all civilized countries, at least in time of peace. (The exception of martial law, military courts, we have already discussed; the present methods of the Irish Free State would be challengeable under our Constitution if applied in one of our States.) Even government is only allowed to take away a man’s life under due process of law.

Bills of attainder put a man to death without due process of law; they are acts of a legislature finding a man guilty, or depriving him of civil rights without a trial of any sort. Thomas Cromwell, by the king’s express command, inquired of the judges whether, if Parliament should condemn a man to die for treason without hearing him in his defense, that attainder

could be disputed; the subservient court replied, that while it would form a dangerous precedent, Parliament was supreme, and no attainder could be questioned in a court of law. And by the irony of fate Cromwell himself was the first to perish by such a bill. Thus established, the device of attainder was used freely, both by Henry VIII and by the Stuarts, as a convenient method of getting rid of political adversaries; and while it has never been forbidden by the British Constitution, it inspired our ancestors with such horror that it is with us doubly forbidden in the Federal Constitution, first to the Federal Government and then to the States.

The law of treason, which had been stretched very far under Henry VII, was at first brought back to constitutional principles, then enacted in a worse form than ever, until Parliament interfered and enacted that no person should be indicted therefor except on the testimony of two lawful witnesses who should be brought face to face with him at his trial; and this safeguard, although shamelessly evaded or disregarded under Elizabeth and James I, never disappeared from the English Constitution and became part of ours. Aaron Burr was saved by it.

The right to life also included the right not to be tortured in order to extract testimony or as a punishment; we strengthened this principle by adopting in our Constitution the clause against cruel or unusual punishments; the rack had been freely used under James. And we further strengthened the general right

by adopting the provision that no *ex-post-facto* laws should be passed; that is, a law made under which a man may be punished though his offense was committed before, making that a crime which was not a crime when he did it, or even increasing or even changing the punishment therefor. Bran, a convicted murderer in the Federal court in Massachusetts, attempted to get off under this constitutional provision because Congress, since the murder on the high seas had been committed, had changed the punishment from death to life imprisonment!

And in cases of impeachment (which is analogous to bills of attainder) our Constitution takes care to provide that the punishment shall only extend to removal from office; and that there shall be no forfeiture or corruption of blood for treason or any other offense.

There are naturally few invasions of this cardinal right so far as a man's person or free movement is concerned in our country. The nearest attempt alleged as a grievance was in the case of vaccination, compulsory in so far as attendance at common schools was concerned; and such a State law, though made by authority delegated without special instructions to a board of health, was held not violative of the liberty secured by the Fourteenth Amendment.* So, as this book goes to press, was a law requiring schools not to teach foreign languages to children below a certain grade. (See in Chapter VIII below.)

But the word *liberty* is of much wider scope. It

* *Zucht v. King*, Nov. 13, 1922.

means, first and foremost, the right of a man not to be put in jail, not to be confined. That also needs no explanation; but again there is a world-wide difference between English and continental notions of a man's rights. With us, when a man is arrested by another man, he brings an action for false imprisonment. If the other man be a soldier or policeman, he may do so still if the arrest be unjustifiable or without warrant; and he may always ask at the time what he is arrested for, and ask to be set at large, or released on bail if arrested for a bailable offense. And the law is so jealous of this right that it has steadily guarded it for a thousand years in this most simple and direct form; a writ corresponding to *habeas corpus* is mentioned in Magna Carta, which says that it shall not be denied, and shall be given without cost; and the clause just before that says that no writ shall be issued in future so as to cause a freeman to lose his court; that is to say, take him away from his local common-law jurisdiction without a chance of release. For six hundred years the kings, Norman, Tudor, or Stuart, tried to get around this writ of *habeas corpus*; to arrest people and confine them or restrain them without trial and without telling why, keeping them perhaps "incommunicado," as is still the practice in some Latin-American countries. As a result the great Habeas Corpus Act was passed, after the English Revolution, which made this weapon of liberty complete. Not only must the writ be given at once and, as a matter of course, gratis, but it is open to anybody at any time,

to be given by any judge, day or night, vacation or term time. The person or power restraining a man of his liberty must produce him in open court within a brief time and the prisoner be discharged within two days, unless it is shown that he is indicted or reasonably charged for an offense for which he cannot offer bail. The fame of this writ has spread through the world, like a sort of magic spell, so that in Brazil they seem to use it when any party litigant is dissatisfied with any court decree; but I cannot find that there is yet anything like it in Germany or even France or other continental countries. There a man may indeed not be deprived of his liberty by another individual; but if he is taken into custody by a government, in any of its capacities, it is not for him to reason why.

Further, the right to liberty includes constitutionally the right to move, go and come, live where he will, emigrate, and, if a citizen, to return; also to forswear his allegiance and expatriate himself, but not against his will; he can never, even as a punishment for crime, be banished.* Wherever he dwell, he must be accorded all legal and all political (therein differing from aliens) rights accorded in such State or American Territory to its own natives. The right to travel is so jealously guarded that the Supreme Court† held a law of Nevada

* A governor of Arkansas is said to have pardoned a convicted criminal on condition that he went to Massachusetts. But this was not compulsory banishment, though it had been if to leave the United States.

† *Crandall v. Nevada*, 6 Wall., 35.

bad which merely imposed a tax of one dollar on stage-coach passengers passing through that State.

And the liberty right includes also—and this is getting to be the most important of all to-day—the right of a man to labor at any trade, to go into any business, to make contracts; in short, to earn his living, or to exercise his functions or his faculties in any manner soever that he at any time choose without any restraint or hindrance or combination against him either on the part of the government or by private individuals.

In the earlier editions of this work I devoted considerable space to the expression of this principle in the great Charter, the charters granted to the city of London or other towns, and in other early English constitutional documents and statutes. This historical exposition may be omitted here, as our present object is the study of how our present American constitutions are of direct practical concern to the American citizen as they stand to-day. Magna Carta said, as expressed in the charter of Henry III, two years after King John's, that no man should be disseised, etc., of his freehold *or his liberties or his free customs*; and Coke's famous exposition of this clause points out that it protects, and was understood at the time to protect, a man's liberties or free customs, meaning thereby not only the laws of the realm, or any franchises or privileges that may have been bestowed on him, but also all that National freedom possessed by Englishmen, full liberty of trade and freedom from

monopoly. The usual phrase in city charters was "the ancient and free customs which are enjoyed by the citizens of London or which were enjoyed by the town itself when they had them 'best or most free.' " These matters were so well understood by our ancestors that the simple phrasing of the Fifth Amendment was sufficient to cover them all, not "to be deprived of life, liberty, or property without due process of law"; and are nowhere better expressed than by Justice Field in the famous Slaughterhouse cases.* "Among these inalienable rights as proclaimed in that great document (the Declaration of Independence) is the right of men to pursue their happiness, by which is meant their right to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their property, or develop their faculties, so as to give them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition"—the word *sex* must soon be deleted—"is a distinguishing privilege of citizens of the United States, and an essential element of that privilege which they claim as their birthright." For the Fourteenth Amendment gave the National Govern-

* 111 U. S., 757.

ment power to protect its citizens against all such action by the States as was, by the Fifth, forbidden to the Nation, adding the principle of equality. So Justice Peckham, a few years later: "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraints of his person—as by incarceration—but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will, to earn his livelihood by any lawful calling; to pursue any livelihood or vocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." * In the Constitutions of North Dakota and Utah: "Every citizen of this State shall be free to obtain employment wherever possible, and any person or corporation maliciously interfering or hindering in any way any citizen from obtaining such employment or enjoying employment already obtained from any other person or corporation is guilty of a misdemeanor"; and that of Georgia: "The social status of the citizen shall never be the subject of legislation"; while that of Washington states squarely, "the object of government is to protect and maintain individual rights."

The Federal courts, acting under the Fourteenth Amendment, will, however, protect only such rights against States or State authorities as are expressly

* *Allgeyer v. Louisiana*, 165 U. S., 589.

guaranteed in the Constitution of the United States; for other "implied," "natural," "general" rights the individual must rely on his home courts and on his State Constitution. Thus, in the Wheeler case cited in the second chapter,* where twenty-five labor-union strikers were railroaded out of Arizona by State sheriffs, Justice Hughes, while repeating in much the same phrase the decisions just quoted, held that the right to live and work where one chose was, like other fundamental rights, so far as interference therewith on the part of individuals is concerned, left to the protection of the several States having jurisdiction. "The entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States and without that of the Federal Government."

No one seriously pretends any more to take away a man's life or personal liberty without due process of law. But the right to control a man, or to interfere with him in his business, or labor, or trade, is being asserted and reasserted more and more, both by his employers and his employees, and by his competitors and by his fellow workmen, and even by the State, even by the Federal Government. Yet it must never be lost sight of that the latter was never intended by the Constitution to concern itself with social and domestic affairs.

Personal freedom was established in England, as to all men but villeins, by the twelfth century. There

* 254 U. S., 281.

were, to be sure, twenty-five thousand slaves referred to in the *Domesday Book*, probably the result of earlier conquest or punishment, possibly of voluntary sale, but these soon disappeared, either by exercising a trade or by acquiring land. For these were the two ways in which a slave or a villein could emancipate himself. The villeins were the farm laborers attached to the land, not paid in money wages, and who were not allowed to leave their master's farm or seek service elsewhere, and this class was originally numerous. But if they acquired land, or if they joined the guild of a trade in a town and worked at it for a year and a day, they became free. Thus the dignity of handicraft was early recognized in England; and an added reason is shown for the importance of our constitutional principle of the right to labor or to exercise any trade; while the other method of emancipation was recognized as recently as the Dawes Act of our Congress, providing that any Indian should become a citizen when he acquired land in severalty. But on the European continent the absolute right of a man to labor and trade was never recognized, nor his right to earn money or make a profit in any way he chose. The last severe statute on villeinage was one of Richard II (1377), requiring those who refused to labor to be committed to jail on complaint of the landlord, but even this provided that villeins fleeing to cities should be made free after a year and a day, joining a guild; and in 1383 Wat Tyler led the rising against villeinage, demanding a commutation of their service into 4d. an acre rent (a money wage was always a badge of

freedom, and the feeling survives to-day in the prejudice against the "peonage" laws of some of the Southern States, or laws made to enforce crop-sharing labor contracts, and in the Acts of Congress against such laws) as well as freedom of commerce in market towns (*i. e.*, the right to trade, whereby villeins got free), and the growth of small freeholders rapidly increased. In 1514 Henry VIII manumitted two villeins in a formula anticipating our Declaration of Independence by two hundred and sixty-two years, "Whereas God created all men free"; and the last statute mentioning villeinage was in 1617.

But simultaneously, and perhaps as a consequence of doing away with compulsory agricultural labor, there grew up the long series of English labor laws, in effect re-establishing the principle that a man might be compelled to work at *some* trade, and fixing a legal wage; as a consequence all strikes to secure a higher wage by combined action became, in England, criminal and restrainable conspiracies. As all these English labor laws have been held never to have been in force in our States, even while they were English colonies, we escaped the latter conclusion; and a strike as such, not complicated by any further combination to the injury of others or the restraint of trade in general or of interstate commerce, has always been lawful in the United States.

Wages had always been fixed in continental countries; but not in England until, early in the fourteenth century, the plague of the Black Death nearly depopulated the country, and after it labor was so scarce that

in 1349 the first Statute of Laborers was passed, which required everybody to work for "the old wages," that is, the wages before the plague; and in the following year these were fixed by law at one penny a day for common laborers, threepence for mowers, two or three for carpenters, three or four for masons, one ha'penny for servants, and so on. It is probable that threepence represented at least a dollar in purchasing power at the prices of 1914. And at that time the Black Prince, the head of the army, was paid twenty shillings a day, eighty times as much as a skilled laborer—more in proportion than we pay the President, and far more than we pay generals, senators, or justices of the Supreme Court. This first Statute of Laborers was probably no law, as the Commons did not join in its enactment; but the idea of fixing wages got firm hold, and it was re-enacted the next year, confirmed in 1360, 1378, and 1388; but in 1389 the attempt to fix wages by law was abandoned, only they were still to be fixed, at Easter and Michaelmas, by a justice of the peace; and this system was repeated in 1427 "because Masters could not get Servants without giving higher Wages than allowed by the Statute." But in 1444 they were fixed again: carpenters, 4d. a day in winter, 3d. in summer, with meat and drink, or 1½d. a day in lieu thereof; women, 2½d. a day and keep at 2d. At last came, under Elizabeth, the "Great Statute of Laborers" (1562), not expressly repealed until 1869.* The

* This statute, too long to quote, will be found digested in the author's "Federal and State Constitutions," p. 102.

working classes always fought manfully against this fixing of their wages by law; not only because it was (then) in the interest of the employers, but because it made strikes for higher wages unlawful; the same fight was carried on in France, but in vain. Wages fixed by the State, with employment monopolized by the guilds, existed and continued to exist until wiped out by the French Revolution. But despite a few early colonial laws, the principle was never adopted in America. The Louisiana Constitution expressly forbids laws fixing the price of manual labor. Only recently has arisen the agitation for a minimum wage; at first to be, not fixed by a board, but recommended merely; later, by laws making it compulsory at least as to women, and in certain occupations. Under the Constitution such compulsory laws cannot be applied to men of full age, except in occupations where the State or Nation acts as employer; thus the New York law provides that wages paid in any public work—by the State, any city or municipality or contractor on the same—shall be the same as are usually paid in the same trade at the same place and time; and under the interstate commerce power Congress can establish a minimum wage for railway employees. The right to labor as *long* as one will, rests on a slightly different principle; for hours of labor, if unduly long, may endanger the public health or safety.

We can now add to our liberty right to trade or freely to labor, therefore, the appurtenant right of free contract for the same; that is, the right of a man to

demand such wages as he can get and refuse to work if not satisfied, and the corresponding right of working for such wages as do satisfy him without hindrance by others; and the right of free employment, that is, the right not to have any trade made a close corporation whether by legislation or by combination of individuals. In England these rights were only won by the laboring classes early in the nineteenth century; with us, they are guaranteed by the Constitution; one may wonder if the labor interests will be wise in abandoning them. There is obvious a reaction toward the older system of State regulation in our legislation, though now of course only for a minimum, not a maximum, wage. But even this may have the effect not only of diminishing employment by making the industry impossible, but of depriving of all employment all but the most able-bodied young men.

The modern use of the injunction has been discussed in an earlier chapter, but only from the point of view of the right to (common) law. The newspapers report (August, 1923), that its use by Federal prohibition agents is, in New York, becoming prevalent, enabling a "bootlegger" to be punished without jury trial, as by imprisonment for contempt. Its use in labor disputes has another objection: that the ordering a workman not to strike, not to leave his employment, comes perilously near the ordering him to perform his employment; and this, as I have pointed out, is under English constitutional ideas not distinguishable from slavery. There were, indeed, these laborers' statutes requiring men to

labor at *some* work in England for several centuries; but so great was the fear of long terms of employment that contracts to do work "in gross"—what we now call piece-work—were not lawful in England until expressly made so by a statute of Edward III (1360).

Among the most recent decisions in which the Supreme Court has vindicated this liberty of trade may be mentioned the case of Smith against the State of Texas,* where a State statute permitting only those who had been brakemen on freight-trains to be appointed as conductors on any trains was held unconstitutional, the court saying: "Life, liberty, property, and the equal protection of the laws, grouped together in the Constitution, are so closely related that the deprivation of any one of these separate and independent rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who *are* permitted to work. Liberty means more than freedom from servitude; and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling."

Restrictions or prohibitions having in view the health, safety, or morals of the public may, of course, be imposed on any trade without contravening the constitutional principle. The obvious example of this is the liquor business. Another usual one is the re-

* 233 U. S., 630.

striction, examination, or licensing required by laws of most States of doctors, lawyers, apothecaries, and many other members of professions or trades before they are permitted to exercise them. Legislatures may press their prejudices even to the point of caprice—for instance, the manufacture or sale of a perfectly healthy article, like oleomargarine, or grape-juice made with the necessary amount of benzoate of soda required in all non-fermented beverages, and the courts, certainly the United States courts under the Fourteenth Amendment, may not interpose the constitutional objection. And legislatures may do this, either by direct prohibition or an onerous system of licensing, as in the “blue-sky law” cases,* or by unequal taxation, even although imposed with the purpose, not of raising revenue, but of driving such persons or craftsmen out of existence.†

So, the Illinois pure-food law which prohibited the sale of all food products containing boric acid was sustained in the Federal Supreme Court.‡ A California statute discriminating between Christian Science and other drugless treatment but without prayer, and in favor of the former, was held not counter to the equal right to labor;§ another, of the same State, imposing

* See *ante*, pp. 91, 92.

† *Hammond Packing Co. v. Montana*, 233 U. S., 331.

‡ *Price v. Illinois*, 238 U. S., 446. Benzoate of soda may be absolutely forbidden in grape-juice, though the United States pure-food law allows it, and yet the United States courts will sustain the State law. (*Weigle v. Curtice*, 248 U. S., 285.) And so, as to skimmed milk mixed with cocoanut-oil. (*Hebe Co. v. Shaw*, *ibid.*, 297.)

§ *Crane v. Johnson*, 242 U. S., 339.

specially short hours on the labor of chambermaids in hotels.* Itinerant venders of drugs or medicines may be absolutely prohibited by law from exercising their trade.† Harmless trades may not, however, be absolutely forbidden, such as employment agencies exacting fees from the workers for whom they secure places.‡ But it is probable that the Federal courts have a more limited power to annul such legislation, acting solely under the Fourteenth Amendment, than the State court would have acting under the whole document of the State Constitution with all its principles, expressed or implied; just as the Federal legislature has corresponding powers of legislation only in matters expressly submitted to its domain or in places expressly subject to its jurisdiction; though the State may make possession of a bottle of whiskey a criminal offense,§ an attempt of Congress to make possession of an article, even opium, produced in any of the States, a crime, “would raise the gravest question of power.” ||

On the point of compulsory labor, the requiring a man to work on the roads, with the alternative of a money payment, having the precedent of centuries behind it, is of course constitutional.¶ As has been said, a sailor’s contract was always an exception to the

* *Miller v. Wilson*, 236 U. S., 373.

† *Baccus v. Louisiana*, 232 U. S., 304.

‡ *Adams v. Tanner*, 244 U. S., 590. A State of Washington statute; but four justices dissented.

§ The mere possession of a bottle of whiskey within a prohibition district may be made criminal by a State law, so far as the Federal Constitution is concerned. (*Crane v. Campbell*, 245 U. S., 304.)

|| *Holmes, J.*, in *U. S. v. Jin Fuey*, 241 U. S., 394, 401.

¶ *Butler v. Perry*, 240 U. S., 328.

constitutional common-law principle against labor contracts for a too long or an indefinite term of service; a shipmaster was not allowed to sign on his crew "for a voyage to the Pacific thence to Asiatic ports and return," with no time limit, and the sailors thus shipped were entitled to leave the voyage when and wherever they chose; and the same result is now practically brought about in all voyages, however short and definite, by the La Follette Law; the sailor may leave the ship whenever he choose, and the shipmaster has to pay his wages in full, up to half the last week, and moreover bring him home at the ship's expense, if he has been provoked into discharging him himself. It is said to be impossible to maintain discipline on ships or have our ordinary merchant marine compete successfully with other countries' under this law.

The so-called peonage statutes of the Southern States, aimed by various indirect contrivances to compel a person, always in fact a negro, to carry out a contract for agricultural service, by imposing a penalty or introducing a machinery of suretyship or otherwise, which has the effect at least of inducing the ignorant negro to *believe* that he is under court orders to work, have steadily been held counter to the Thirteenth Amendment; the latest case was of the Alabama law, in 1916.*

As to the fixing of wages by law, or the return of profit to be permitted in trade, the emergencies of the Great War have caused such a general upsetting of

* U. S. v. Reynolds, 235 U. S., 133.

previously held notions that it is hard to predict at just what point the court will again begin to apply constitutional inhibitions against the mania for regulating wages and prices. The older view is well expressed by Lamar, J., in his dissenting opinion in the *Kansas Insurance Case* already quoted,* a dissent in which the Chief Justice and Van Devanter, J., joined (nor is it to be presumed that the majority differed from Lamar in his statement of principle, but only that in the insurance business a corporation dedicated its property to the public use so as to be liable to rate regulation by the State); to the effect that "Simple contracts of indemnity are personal, strictly private. If such can be regulated, everything can be, within the whole circle of business transactions. Parliament could, of course, do it; for it sat 'as a perpetual constitutional convention.' Its laws did not stop at fixing the price of property, but like the present act they fixed the price of private contracts and, by statute, prescribed the rate of wages, and made it unlawful for the employee to receive or for the employer to give more than the wage fixed by law . . . these laws were felt to be an infringement on the rights of man . . . in time the great injustice in this was so far recognized that laws fixing the price of private contracts seem to have been repealed, and Lord Ellenborough, while enforcing, as proper, a rate for public wharfs, was able to say 'that the general principle is favored, both in law and justice, that every man may fix what price he

* 233 U. S., 389.

pleases for his own property or the use of it.' But what was a favor in England, that might at any time be withdrawn, was in this country made a constitutional right that could not be withdrawn. 'For although the practice of fixing prices may have prevailed in some of the Colonies up to the time of independence, it has been commonly supposed that a general power in the State to regulate prices was inconsistent with constitutional liberty.' " (Cooley.)

Nor can the State hamper, or restrict by any condition, a man's elemental right to find work and contract for his labor, or the corresponding liberty of contract on the employer's part, except to prevent fraud, oppression, or in the obvious public interest (as, for instance, in weekly-payment laws, laws against company shops, etc.). Thus, a Kansas statute making it criminal for an employer to exact as a condition of employment a promise not to join a labor-union was held counter to this liberty. "Included in the right to personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin

to acquire property, save by working for money . . . nor can the State, by designating that as 'coercion' conduct which is not such in truth, render criminal any normal and essentially innocent exercise of personal liberty or of property rights; for to permit this would deprive the Fourteenth Amendment of its effective force in this regard. It recognizes 'liberty' and 'property' as coexistent human rights, and debars the States from any unwarranted interference with either. . . . Conceding the full right of the individual to join the Union, he has no inherent right to do this and still remain in the employ of one who is unwilling to employ a union man . . . [so] a labor organization has the inherent and constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with non-union men." The Fourteenth Amendment applies just as strongly to the States as, in *Adair v. U. S.*,* the Fifth was held to apply to the United States.†

In the recent *Hitchman* coal-mining litigation,‡ referred to at length later for its clear announcement of the limitation of the right of association, the court held, by Mr. Justice Pitney, that the employer is as free to make non-membership of a union a condition of employment as the laborer is free to join the union, and this is a part of personal liberty not to be taken away even by legislation, unless through some exercise of the paramount police power.

* 208 U. S., 161. † *Coppage v. Kansas*, 236 U. S., 1. ‡ 245 U. S., 229.

The amount a man shall charge for his services must still be matter of free contract, probably now as to women also,* save in industries "where property is devoted to a public use" or in industries or callings "affected with a public interest." The distinction between these two tests is real, and was much discussed in the dissenting opinion in the *Kansas Insurance Case*; yet it may be said that neither shibboleth affords a satisfactory test, nor does the still older one that a man holds himself out to serve all comers without liberty to

* Since writing, the position taken in the text has been taken (April 9, 1923) by the decision of the Supreme Court in the District of Columbia women's and minors' minimum-wage case, *Adkins v. Lyons*, five justices rendering the opinion. The law provided for a minimum wage to be fixed, in the District, by a board of three, its members respectively representing the employers, the employees, and the public, in most industries, the standard to be determined by the cost of living and the wages necessary to maintain women employees of any age and minors under eighteen in good health and morals. And the board were authorized to give a special license to women to take less than the prescribed wage when their earning capacity was impaired. It was held counter to the Fifth Amendment, as to women, on the broad ground that the doctrine of *Muller v. Oregon* had been altered by the Nineteenth Amendment, and that women could no longer be legislated for as "wards" of the State, entitled to peculiar protection or subject to peculiar restriction in such matters. Also, the standard was too vague; and the court were not prepared to admit that women's morals were dependent on their wages; "if women require a minimum wage to protect their morals, men might be said to require it to preserve their honesty." It will be noted that this decision does not invalidate those minimum-wage laws existing, as to men or women, in Massachusetts and other States, where the sum fixed by the board is recommendatory merely, meant to influence public opinion, but not compulsory.

And, as this book is going to press, in the case of the *Kansas Industrial Relations Court* (*Wolf Packing Co. v.*), through the Chief Justice, that the Kansas law was unconstitutional in giving it power to fix wages, although through arbitration by a State board. The plaintiff was a packing-house, but, in the reported language of the opinion, the principle would apply to all ordinary employment: "since the adoption of our Constitution, one does not devote one's property or business to the public use, or clothe it with a public interest merely because one

refuse anybody. Innkeepers do that; yet no law attempts to regulate their charges; on the other hand, the charges of cabmen always have been regulated. And who would say that an oil-refinery making gasoline for automobiles was not, in these days, as much devoted to the public interest of transportation as a railroad? A better test would be to apply regulation of charges to those enjoying an exclusive franchise, as a ferry, or a chartered or natural monopoly like a railroad, or the grain-elevators in Buffalo controlling all

makes commodities for or sells to the public in the common callings. . . . An ordinary producer, manufacturer or shopkeeper may sell or not sell as he likes, and while this feature does not necessarily exclude businesses from the class clothed with a public interest, it usually distinguishes private from quasi-public occupations." (May 11, 1923.) The court reaffirmed liberty of contract to both employer and employee as a constitutional right federally protected by the Fourteenth Amendment, and not sufficiently secured by the right of either to quit the employment at will; and apparently distinguished the three lines of "business affected with a public interest": businesses carried on under a franchise, defined as the "authority of a public grant or privileges imposing the affirmative duty of rendering a public service demanded by any member of the public, . . . those occupations, regarded as exceptional, where the public interest attaching has been recognized from earliest times, such as keepers of inns; and business enterprises which, though not public at their inception, may fairly be said to have become such, where the owner by devoting his business to the public use in effect grants the public an interest in that use, and subjects himself to public regulation." The mere declaration by a legislature that a business is affected with a public interest is not conclusive. The expression means more than that the public welfare is affected by the continuity of or by the price at which a commodity is sold or a service is rendered. "The circumstances must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public."

It is noteworthy that Mr. Gompers in a newspaper interview (*Boston Herald*, June 12, 1923) gave his approval to this decision as doing away with the fixing of wages by law, thus recurring to the earlier historical attitude on such questions of the labor interests.

the water-front. In the writer's opinion the courts will ultimately have to come to the simple test of common sense—the general public interest, the “rule of reason.” The sense of limiting the charges of intelligence offices or even insurance premiums is just as obvious as that of prescribing the prices of boots and shoes is not.

The question of limiting the prices charged for commodities infringes rather on the constitutional right to property than that of the rights of labor. Vain efforts were made against “profiteering” during the Great War; but the statutes were all held unconstitutional either as infringing on the constitutional principle or as fixing too indefinite a standard. Yet extortion was a crime at the common law, and it does not appear that it applied only in trades or properties “affected with a public interest.” Much of our unintelligent legislation is due to the failure of our law schools to teach law historically.

Combinations to deprive a man of his free right to labor are both criminal and subject to damage suits and injunctions; and statutes attempting to legalize such combinations are unconstitutional; but we shall find it convenient to devote a special chapter later to associated action against cardinal rights. Remains the question how far the State itself can enter upon or monopolize trade to the detriment of or in competition with or exclusion of private enterprise.

Such instances are entirely modern. In the famous case of *South Carolina v. the United States*, it was impliedly held that, so far as the Federal Constitution

went, there was no objection to a State's monopolizing the retail liquor business.* But under the State Constitutions there are authoritative decisions to the contrary. Under an opinion of the Supreme Court of Massachusetts given at the request of the legislature municipal coal-yards for the retail distribution of coal were held to be unconstitutional. Such opinions given by courts at the request of the legislative or executive departments are not considered so authoritative as those rendered in actual litigation after a trial and arguments heard on both sides;† and in view of recent experience this opinion might well be otherwise to-day. The Supreme Court of Maine has since then declared a law to be constitutional providing for the establishment of such yards for the sale of coal, wood, or other fuel, and the Supreme Court of the United States decided that that was a public purpose for which taxes might be levied without violating the Fourteenth Amendment.‡ The new State of Oklahoma provided in its Constitution that "the right of the State to engage in any occupation or business for public purposes shall not be denied or prohibited, except that the State shall not engage in agriculture for any other than educational and scientific purposes and for the support of its penal, charitable, and educational institutions." But the Federal Government under its war power, like the State under ordinary police power, may prohibit any traffic or manufacturing business deemed obnoxious

* *South Carolina v. U. S.*, 199 U. S., 437.

† 182 Mass., 605.

‡ *Jones v. Portland*, 245 U. S., 217.

to the public welfare, and that without compensation to the owners, the Nation not being in this prevented by the Fifth Amendment, nor the State by the Fourteenth;* and, as a measure reasonably necessary to make prohibition effectual, Congress in the exercise of such war power may prohibit liquors of more than one-half of one per cent of alcoholic content, although such are not intoxicating,† or any beer.

It should always be remembered that this liberty right to trade or labor is peculiar to England and America, for that explains the failure of our European-born population to understand and appreciate it. On the Continent the absolute right of a man to use any labor or trade without license or hindrance was never recognized, nor was he protected from the competition of State monopolies or hostile combinations; but while the English law early recognized guilds, it was careful to provide that their by-laws should be reasonable and not in restraint of trade; nor were they allowed to control other persons' liberties. While in France they grew so arbitrary and powerful that it was impossible for a man to work at a trade without their consent. So they earned the hatred of the people, and Carlyle tells us how they were abolished at the French Revolution amid bonfires and the ringing of bells—labor had become free in France, as it always was in England. Only those who are ignorant of our Constitution and its history would thresh this old straw over again.

* *Hamilton v. Kentucky Distilleries Co.*, 251 U. S., 146.

† *U. S. v. Standard Brewing Co.*, *ibid.*, 210.

CHAPTER VI

THE RIGHT TO PROPERTY

This, usually enumerated as the third of the cardinal or elemental constitutional rights, is perhaps as old as the right to personal liberty. In fact, it may almost be said to result from it, as it certainly is a consequence of the right to labor. All personal property is the result, in last analysis, of free labor. Ownership of land was a cause of freedom in itself. There is no recorded history of a time when our race did not recognize the right to property quite as firmly as we do to-day; the only difference was that in early times some of the land was held in common. Property in land seems to have preceded personal property, merely for the reason that at first there was very little of the latter, though a man always owned his spear, his clothing, his personal belongings. His house or hut, of course, was on his land. Other than this the earliest personal property was cattle and domestic animals; and there is no record of a time when these might not be owned in private ownership. Thus our word "chattels" for all personal property is doubtless a corruption of cattle. So our earliest law was not much concerned with personal property, though there are some statutes recognizing it long before Magna Carta; thus in 1100

we find a statute giving a man the right to bequeath it at his death; while the great Charter treats of it in many clauses, as well as of real. It was never necessary to define the right to property in abstract terms; the word itself is not contained in any constitutional document before the Virginia Bill of Rights; but the Massachusetts Body of Liberties (1641) protects a man's "goods or estate." The word "freehold" and "cattle" in Magna Carta comprise all varieties of property then commonly enjoyed. It is noteworthy that the property right is guaranteed by the same words and in the same clause in all constitutional documents from Magna Carta to the Constitution of Oklahoma, though the latter afterward qualifies it by saying that a man has an inherent right only to such property as results from his own natural industry.

Absolute right of private property, in all things, is of course inconsistent with socialism or communism. The latter word speaks only in terms of property, and means simply the denial of the property right to individuals. Socialism, on the other hand, speaks in terms of liberty; it controls all individual *action* by the State, and might or might not permit a certain amount of private property. The more intelligent modern schemes of socialism do permit private property in all save natural resources, mines, factories, or other instrumentalities for the production of wealth. Both are in terms inconsistent with the Federal and with all the State Constitutions as they now stand; socialism doubly so, as inconsistent with both the cardinal rights

of liberty and property. Socialists have for that reason been excluded from naturalization, as have been and are anarchists; and from immigrating also; but this latter under an express law of Congress applying primarily to anarchists (those who are against all government). But no one can take the ordinary oath of office who is either socialist or communist; for in that he must swear to support the Constitution of the United States, which expressly sanctions the institution of private property and, of course, personal liberty. Yet the matter, as to citizens, is never pressed; there have been socialist members of Congress and holders of other offices; and the recent action of the New York legislature in expelling socialist members was probably unwise. If the socialist scheme is unworkable or obnoxious to our liberties and customs, the best way to show it so is by open discussion. The forbidden is always attractive, particularly to young people. "Parlor" socialists are usually callow; and even the soap-box is a better forum.

The English state, however, has never surrendered its control of property by way of what is called "eminent domain"—a doctrine which may probably be traced to the feudal system and the Crown's power as overlord. I question whether it has any Saxon authority. Yet it is recognized, in Magna Carta, and not as to land alone, but cattle, timber, or corn; and there was a bill introduced in Massachusetts to seize one of Sargent's frescos in the public library under this power on the ground that the picture was offensive to Jews.

The individual's constitutional protections against the government's power of taking, using, or damaging property by eminent domain are simple and efficient. The taking, etc., must be for a public use; damages must be paid at the time of taking, and the amount found by a jury.

The other permitted infringements—but always and only by the government, it can never be at the instance or for the profit of another individual—of the individual's absolute property rights are by taxation, regulation of rates, charges or prices, and the “police power.” The earliest tax, in the modern sense, other than the feudal aids, was the Saladin tithe on personal property (1188). And almost immediately—twenty-seven years later—Magna Carta provided that no tax should be levied without the common consent of the realm; and in 1297 Edward III's confirmation added the words that taxes must be “for the common profit of the realm.” Both principles, after bringing about the Revolution, are expressly preserved in American Constitutions, and remain our bulwarks against the floods of wasteful experimentations and “pork bills” now overwhelming Congress. The Federal Constitution expresses it, that taxes must be for the *general* welfare of the United States and be uniform. (For a discussion of this much-abused clause, see later; it does not make it constitutional for the Federal Government to undertake any object for which taxes might be imposed.) And it went much further than did Magna Carta in that it in effect withheld from the power of the

Federal Government any direct taxation at all—a restriction now removed by the Sixteenth Amendment, without which it would have been impossible for us to finance the Great War. A few State Constitutions also provide that taxation must be proportionate; this would preclude a graded income tax; for this reason the New Hampshire Constitution is now sought to be amended.

There is a broad distinction between these taxes on property and franchise or excise taxes. These latter were the sole source of the revenues of the Federal Government down to 1913; and are subject only to the condition that they must be geographically uniform and alike throughout the United States to persons or corporations on articles or privileges of the same class; any exception or differentiation by a classification will be constitutional when not too arbitrary or imposed for the primal purpose of destroying the particular business or personality taxed. Thus a Louisiana tax law aimed solely at the American Sugar Company was held counter to the Fourteenth Amendment. "Legislation so aimed as to put only one person or corporation out of business is not equal protection of the law." * This distinction between excise and direct taxation is extremely important, not only because, except as to incomes, only the States can impose the latter, but because excise taxes are free from this requirement of being proportionate and of other constitutional restrictions; thus a State can impose an excise

* *McFarland v. Am. Sugar Ref. Co.*, 241 U. S., 79.

tax on corporations although chartered in other States and fully taxed there; doubled or trebled inheritance taxes are made possible, in all the States where the decedent leaves any property; and the immense Federal corporation income tax was sustained, upon all State corporations doing business under a State charter, although it was admitted that the charter itself, being the creature of a sovereign State, might not be taxed—a distinction, a layman might say, but not a difference.* The extreme case of destruction of a trade ordinarily harmless by a Federal excise tax is probably the Oleomargarine Case (1903), as it perhaps also marks the extreme invasion of the State's reserved rights in property matters by the Federal power,† but it is worthy of note that the Chief Justice and two others dissented, and it is hardly in line with the Child-Labor Case. (See p. 197.)

Neither the police power nor the regulation of charges is mentioned in any constitutional document. Early English laws are full of instances of fixing, not only rates or tolls but prices; besides the very common fixing of the price of bread or beer according to the price of wheat or barley (1266). The great Statute of Westminster (1275) prohibits "excessive toll contrary to the custom of the realm in all market towns"; and there are many such statutes applying to ferries, wharfs, toll roads, and all other franchises or monopolies *created by law*. In 1691 there is a general statute

* Corporation Tax Cases, 220 U. S., 107.

† McCray v. U. S., 195 U. S., 27.

fixing the rates charged by common carriers. Moreover, extortion was always an offense at the common law, in persons keeping a ferry, etc.; but I am inclined to think this only meant *discrimination*, which was always illegal in public employment and would have been so here without our railway rate regulation acts, had litigants invoked the common law. Logically it would seem that the right of the State to regulate charges made by those enjoying franchises it has granted would be absolute; it has no connection with the eminent-domain principle requiring property not to be taken without compensation; but our courts have held it subordinate to the constitutional provisions securing property right, just as in cases where no special franchise has been granted.

What trades can thus have their rates fixed has already been discussed. "Confiscatory" rates, even when imposed by law of a State, will be annulled by Federal courts under the Fourteenth Amendment, and, if by Act of Congress, under the Fifth; and the one power goes as far as the other. Such rates are those which do not afford a fair return on the present value of the property "dedicated to a public use" of the person or corporation whose rates are being regulated.* But as this standard obviously cannot imply in cases like that of the Kansas insurance companies,† who had no property thus dedicated, the court had perforce to

* In determining whether rates are confiscatory, calculation is based on the fair value of the property used in the public service. (*Darnell v. Edwards*, 244 U. S., 564.)

† See above, p. 89.

recur to the common-law standard—usual or customary tolls. Indeed, the Supreme Court has decided this to be the standard, in the absence of a law fixing the rates. But when there is such a statute, “they will not substitute their judgment for that of the commission,” and hence unless the rate be clearly confiscatory will hear no appeal from them—though they would have from the decree of a lower court or auditor deciding what was a reasonable rate at common law.* This, they held, for the reason that the act of the commission fixing the rate is legislative. But the question of what is confiscatory remains judicial. And that is exactly the constitutional objection to these commissions: that they exercise both legislative and judicial powers, contrary to the Constitution, and deprive us of that very appeal to the courts which the Supreme Court at least (not usually the State or even the United States Circuit) seems, by such a ruling, practically to deny.

There were, of course, the old common-law statutes against forestalling, regrating, and engrossing, which have fallen into disuse; though made “perpetual” under Elizabeth, they were repealed in 1772—possibly prematurely—for there is probably not a fish nor a

* In the absence of legislative rates, courts apply the common law in passing upon the reasonableness of rates; after legislative rates are fixed, those; unless there are constitutional objections. (*L. & N. R.R. v. Garrett*, 231 U. S., 300.) The fair return to a public-service corporation must be determined by giving consideration to the cost of labor and supplies at the time the investigation is made. A return of 5½ per cent on such value is inadequate. (*Missouri Bell Telephone Case*, May 23, 1923.)

pound of meat nor a quart of milk nor a ton of coal that goes into the New York or Boston market that is not both forestalled and regrated, if not engrossed! Yet the doctrine forbidding forestalling had its revival in recent statutes, usually of the Southern States, against the buying of "futures" in cotton, etc.; and that of regrating in statutes against "profiteering" (which is an exactly equivalent term) in the Great War; and that of engrossing (from whence our word grocer) lies at the bottom of all our antitrust legislation. However, our statutes ordinarily do not now attempt to restrict freedom of trade even in these respects as to *individual* action.* A notable exception, however, are those statutes against futures, the buying or selling grain or other staple crops not owned by the vender or then ready for delivery or even yet in existence, first passed by several of the States and finally by Congress. Such laws are constitutional in the States (being but the re-enactment of old common law), but the first Federal act, imposing a tax of 20 per cent on contracts in grain futures, was attacked by the Chicago Grain Exchange and held unconstitutional because not necessarily restricted to interstate commerce, over which alone Congress had authority; and not sustained as a tax law under the "general welfare" clause, under the authority of the Child-Labor Case, because it was obviously intended not primarily as a tax, but an attempt through the taxation power to

* The reader, if interested, will find this matter more fully discussed in the writer's treatise on *Popular Lawmaking*. (N. Y., 1907.)

interfere with State powers, regulating the Chicago Board of Trade through the National Secretary of Agriculture.* But when the act was amended by Congress so as to apply to interstate-commerce transactions only, it was sustained.†

The fixing of prices of commodities has of course less justification constitutionally speaking than that of rates for public service. Precedents under early English or colonial times have been disavowed by our courts under our constitutions. The emergencies of the war and the late coal strikes have possibly caused public opinion to take a new point of view; and in the long run the courts interpret constitutions according to public opinion. That liberty of contract guaranteed by the Constitutions, both State and Federal, seems at present to interpose an insuperable obstacle in the way of fixing prices by law, even of the necessities of life; yet if, for example, a whole community were perishing for lack of coal—*salus populi suprema lex*—the common-law crime of extortion might be revived or extended—a statute might constitutionally punish or forbid profiteering, as with a definite standard of permitted profit, as in usury laws. Such statutes hitherto attempted have been set aside as too vague. If a man is to be punished for his conduct as for a crime, some clear rule of conduct must be set forth in the law which he can understand.‡

* Hill v. Wallace, 259 U. S. See also pp. 197, 198.

† Board of Trade of Chicago v. Olsen, April 16, 1923; McReynolds and Sutherland dissenting.

‡ U. S. v. Cohen, 255 U. S., 81.

The right to property necessarily involves the right to make what contracts one will concerning it; for only by contracts can property be either acquired or fully enjoyed. There are English decisions which set forth the right to free contract as absolute; and many dicta of our highest courts apparently go that length.* We will content ourselves by saying that a man may freely make, and the courts will enforce, any contract which does not embody or necessarily result in anything criminal, immoral, or on its face against the public welfare. The difficulty, of course, lies in setting any bounds to the last phrase.

For in legislating on such matters both States and

* For a full discussion of this question, see the writer's *Handbook to the Labor Law of the United States*, chap. I. And for the latest pronouncements of the Supreme Court: "We must consider what it is of life, liberty, and property that the Constitution protects. What life is, and what may or may not affect it, we have quite accurate tests . . . and what liberty is, in its outside sense, and, in like sense, what property is. We know that it is of the essence of liberty—indeed, we may say, of life, that there shall be freedom of conduct; and yet there may be limitations upon such freedom . . . that in the concept of property there are the rights of its acquisition, disposition, and enjoyment—in a word, dominion over it. Yet all these rights may be regulated." (McKenna, J., in *Hall v. Geiger-Jones Co.*, 242 U. S., 539.) And the opinion of the same court in *N. Y. Life Ins. Co. v. Dodge*, 246 U. S., 377, closes with the words: "That liberty of contract guaranteed to all by the Fourteenth Amendment."

The Cohen Case applied to extortion in sugar by a grocery, but the most persistent effort in recent legislation to regulate prices is in the matter of rents and housing. New York and District of Columbia (Federal) statutes have both been held constitutional, though controlling through a board the amount to be charged by landlord for rent, and even invalidating a contract made with the tenant's consent, but after the law went into effect, or (in the New York case) even with another person before the law, as not depriving him of property rights guaranteed him by the Fourteenth Amendment; or, perhaps, we should say, holding the war power of government supreme over it; or, in the District case, the Fifth. And that the rent so fixed should be "just and

Nation must rest for constitutional justification on what is known as "the police power"; but their judgment is final unless on the face of the law the courts determine that the contracts forbidden or the line of action proscribed bear no reasonable relation to the ends the legislature had in view—even assuming that these ends were so clearly for the public weal or the prevention of crime, fraud, or immorality as to justify the invasion of the liberty or contract right. This the courts are naturally loath to do; and rarely are laws, especially State laws, set aside for that reason by the Supreme Court. This, "the police power," has thus be-

reasonable" was held a sufficient standard to meet the objection of delegated legislative power. But this law was limited, to expire in 1922, as was the New York statute, and the tendency of the court in the latest cases seems distinctly more conservative, the decision being carefully based on the emergency caused by the war. Even this seems hardly compatible with the *Milligan* and other Civil War cases. (See pp. 27, 78.) And the Chief Justice, McKenna, Van Devanter, and McDaniel dissented from the majority opinion rendered by Holmes. (*Block v. Hirsch*, 256 U. S., 135; *Brown Co. v. Feldman*, 256 U. S., 170; *Levy Leasing Co. v. Siegel*, 258 U. S., 242.) And McKenna, rendering the dissenting opinion in the first case, quotes again from the *Milligan* Case: "No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its [the Constitution's] provisions can be suspended during any of the great exigencies of government."

Perhaps therefore the high-water mark of permitted legislation has been reached in such price-fixing matters as in the regulation of rates, the laws limiting hours of labor and wages, and generally Federal interference with State industry and other similar problems; and it is probable that, short of another constitutional amendment or a complete reconstruction of the Supreme Court, such legislation fixing prices will in the future be limited to the "war powers," or, possibly, some great emergency caused by a public catastrophe. Independent of the constitutional objection, the better economic opinion certainly is that such attempts to control rents are in the long run not to the interest of the tenants themselves as discouraging the building of houses—just as mortgage-foreclosure restrictions unduly favoring the borrower have the effect of causing him to pay a higher rate of interest.

come perhaps the most usual and portentous pretext of the invasion of human liberties by new-made law; all the more that such laws usually depend for their administration, not on courts and juries, on punishment for wrongdoing, but on the affirmative coercion of some administrative commissioner or board without any substantial appeal. The corruption and the misunderstanding that such a system leads to, especially among our citizens recently arriving from southern Europe or the Near East, who are thoroughly used to dealings with minor potentates, bring great dangers. The chief of police of one of our large cities has told me that there were in that city more than eleven thousand ordinances breach of which was penal or criminal; and that he had found it absolutely impossible to persuade those elements of our foreign population that any matter could not be "squared" or any desired permission obtained by "seeing" the right commissioner, or the right friend or lawyer of the right commissioner, who had the matter under his administration.

We may close this chapter by quoting a few of the most recent utterances of the Supreme Court on the leading principles it discusses. The classic opinion on taxation, that it must be for the common benefit and exempt no individual or class, was rendered years ago by one of its most famous justices: "To lay, with one hand, the power of the government on the property of the citizen and with the other to bestow it upon favored individuals to aid private enterprises and build

up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation." *

"The security of property, next to personal security against the exertions of government, is of the essence of liberty. . . . Protection to it has been regarded as a vital principle of republican institutions. It is next in degree to the protection of personal liberty and freedom from undue interference or molestation. . . . Our social system rests largely upon its sanctity." †

A State penal statute which prescribes no standard of conduct that it is possible to know violates the fundamental principle of justice embodied in the conception "due process of law." The statute expressly permitted the pooling of crops, and forbade selling outside the pool (tobacco, in Kentucky). But the Kentucky Constitution prohibited "combines" to fix the price or raise it "above its real value." If the pool did this, the defendant was punishable for joining it; if not, for selling outside it. And what was "the real value"? Yet, like a child in a fairy-tale, defendant was punished if he did not answer this riddle correctly! ‡

There is nothing to prevent one's voluntarily join-

* Miller, J., in *Loan Association v. Topeka*, 20 Wall., 655.

† McKenna, J., in *Block v. Hirsch*, 256 U. S., 165.

‡ Hughes, J., in *Collins v. Kentucky*, 234 U. S., 634. So, in *International Harvester Co. v. Kentucky*, *ibid.*, 216, an antitrust law punishing combinations to fix prices at greater than the real value of the article offered for sale affords no standard of conduct and is too indefinite. No one can determine "its market value under fair competition and normal market conditions" as, under the law attacked, they were bound to do. This opinion was by Holmes; McKenna and Pitney dissenting.

ing a socialistic community or a religious order doing away with private property. An agreement to live in community and renounce individual rights of property, but with a right to withdraw at any time, invades no constitutional right. An order of "religious men living in community" is not against public policy, and its rules as to the descent of a member's property, including copyrights, will be enforced in the courts.*

The prohibition statutes, State or National, which before the Eighteenth Amendment had to rest on the police power of the States, or of the Nation as to interstate commerce, are of course the most notable instance of the supremacy of that power over ordinary property rights. Despite Mr. Justice Holmes's dictum as to opium, and before the amendment, a State law making the mere ownership of whiskey a crime was sustained; yet opium is not produced in the United States, and whiskey is; and most people would think the former the more harmful of the two. (See above, p. 111.) The amendment itself has been held to have been constitutionally adopted, in an opinion giving no reasons; and that, under Sec. 2, the Federal Government, as under the Volstead Act, may proceed to enforce it without the State's concurring, was decided in the same case; as also that the Federal Government may enact that liquor containing one-half of one per cent alcohol is intoxicating; but with two dissenting opinions †—McKenna and Clarke, and McReynolds in

* Order of St. Benedict v. Steinhauser, 234 U. S., 640.

† National Prohibition Cases, 253 U. S., 350.

doubt. So a law forbidding the transportation of whiskey across State lines, before the amendment, into a "dry" State.* As has been said, a State may tax out of existence or even directly forbid the manufacture of or trading in obnoxious articles, such as oleomargarine, food containing benzoate of soda, etc.† And the enjoyment or use of real property may be restricted indefinitely under the police power, in the case of stables in cities, dangerous or objectionable trades, restrictions in heights of buildings, "zoning laws," etc., or laws prohibiting or taxing the use of land for the erection of bill-boards. ‡

* U. S. v. Hill, 248 U. S., 420.

† Weigle v. Curtice, 248 U. S., 285.

‡ Cusack Co. v. Chicago, 242 U. S., 526.

CHAPTER VII

CONSTITUTIONAL PROTECTION AGAINST COMBINATIONS

The common law of combined action, or of combined possession, is radically different from that of individuals. For the latter, as Justice Holmes says in his classic work on *The Common Law*, does not punish or prohibit acts otherwise lawful on account of the evil intention with which they are done.* The infinitely more powerful effect of the *combined* action of multitudes, or the combined possession or monopolization of a necessary of life, was in earliest times treated by the law as punishable or preventable in itself, regardless of the fact that all the actions contemplated or the result intended were not in themselves unlawful, if they tended to the injury of the public or the oppression of an individual or the depriving him of a lawful right.

No branch of our law has been so little understood as this, in modern times and in our country. Partly that our law schools have never taught historical English law, partly on account of an ancient dictum to the effect that the law of conspiracy is intricate and difficult

* "A man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of the law are external standards." (*The Common Law*, p. 110.) But that is not so of *combinations* of men.

to understand, our lawyers and legislatures have let it go at that and contented themselves with enacting a mass of so-called "antitrust" or boycott legislation, which, when constitutional, but clumsily expressed this common law, but more often had to be set aside by the courts as contrary to some cardinal liberty hereinbefore described.

Far from intricate, the law of "conspiracy" (this word merely means *unlawful* combination) is almost mathematically simple. A conspiracy is a combination to effect (1) a lawful end by unlawful means, or (2) an end which is criminal or contrary to private or public right, whether the means (acts actually committed) be lawful or not. The only doubt has ever been as to whether when the end was merely to injure an individual or public weal without any criminal action, it could be punished as a conspiracy; but the Supreme Court of the United States, anticipated by decisions in many States, has come squarely to agreement with the old common law on this point as well.* There is still a respectable body of legal opinion which cannot understand, or resents the idea, that a man may not do

* In *Hitchman Coal Co. v. Mitchell*, previously discussed (see p. 115), an injunction was awarded against the defendants conspiring (combining) to induce the plaintiff's employees to leave its service, to its injury, although in admitted exercise of their own right of freedom of contract, their contracts made with the coal company expressly recognizing their right to leave and join a union, though they agreed not to do so while they continued in its employment. "Any violation of the plaintiff's legal right contrived by the defendants for the purpose of inflicting damage, or having that necessary effect, is as plainly inhibited by law as if it involved a breach of the peace." And the court held that a combination to procure concerted breaches of contract by plain-

in combination with others what he may do singly. The labor interests are vociferously against it, and have secured a modification of the law by an Act of Parliament in Great Britain, and President Gompers of the American Federation of Labor, born in England himself, has vainly attempted to secure the adoption of a similar statute by our States in general and by Congress; but as this exemption is for mechanical laborers and what in England are called "trade disputes" only, its constitutionality would be with us questionable as class legislation. Nevertheless, our State statutes which have attempted to codify the law of combination have very generally exempted farmers and agricultural labor, but, although generally upheld in the States, they have been made impossible by a decision of the Supreme Court under the Fourteenth Amendment.* But the Supreme Court has recently sustained such a State statute which applied to combinations of employers only, not of employees.†

tiff's employees was such a violation. "As was said in the Gompers Case, 221 U. S., 439, the very fact that it is lawful to form these bodies [unions] with multitudes of members means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many as well as the many against the one." (Pitney, J.; Justices Brandeis, Holmes, and Clarke dissented.)

* *Connolly v. Union S. P. Co.*, 184 U. S., 540.

† *International Harvester Co. v. Missouri*, 234 U. S., 199. "A State statute is not unconstitutional as denying equal protection of the law which prohibits combinations, etc., but embraces only the vendors of commodities and not vendors of labor or services; there is a reasonable

Yet the principle protecting both the public and the individual from combinations of others, whether in action, or in possession where it tended to monopoly, is as old and well established as any law we have, and expressed in English statutes so ancient and monumental as to be fairly considered, in England, constitutional. It was recognized by Napoleon as one of the greatest contributions by English legal history to individual liberty, and adopted by him into the Code Napoléon; this law of *association*, as it is called in continental countries. Its justification, in logic, is of course the tremendous power of combination. I may dislike a man; I may even wish him ill, and so refuse to trade with him; I am within my legal right. I may perhaps even advise my friends not to trade with him; but when I call a meeting of all the town and we agree not to trade with him, when I effect a combination against him, our united action may amount to his ruin. And it is the *combination*, not any act done under it or even the end secured by it, that is the crime; this is the answer to those who see nothing criminal in the action. And it differs from other law of private right only in this, that the obnoxious purpose need not necessarily be criminal, but merely a moral, wrong;

basis for such distinction. . . . A classification must be adopted to the problems of legislation . . . questions of policy are not for the courts; it (the classification) may depend on the *degree* of evil, so long as it is not unreasonable or arbitrary. . . . It must be borne in mind that the differentiation between labor and property is so great that they do not belong to the same general classification of rights or things, and have never been so recognized by common law or by legislative enactments." In other words, labor is not a commodity—long a slogan of the labor leaders.

motives are gone into (as they are in all criminal law), and if the object of the combination be to injure another or molest him in the enjoyment of a constitutional right, it becomes a conspiracy, *i. e.*, unlawful, possibly criminal, certainly giving the wronged individual—or the public, if it be the public wrong—title to injunctive protection. “All confederacies wrongfully to prejudice another are misdemeanors at common law and indictable accordingly, whether the intention is to injure his property, his person, or his character . . . or to injure public trade, affect public health, to violate public policy, to insult public justice. . . . There are many cases in which the act itself would not be unlawful if done by a single person which would become the subject of indictment when committed by several with a joint design.” *

The first statute of conspiracies was enacted about 1305, but there was a special writ against “conspirators” in 1300, so the offense must have been well understood then. In 1330 what we now know as the boycott was defined and made a criminal offense; another statute followed in 1337, and in the great Statute of the Staple (1353) the prohibition is specifically extended to combinations in restraint of trade,

* “While a retail dealer may unquestionably stop dealing with a wholesaler for any reason sufficient unto himself, he and other dealers may not combine and agree that none of them will deal with such wholesaler without . . . violating the Sherman law. . . . An act, harmless when done by one person, may become a public wrong when done by many acting in concert . . . if the result be harmful to the public or to the individual.” (Lurton, J., in *Grenada Lumber Co. v. Mississippi*, 217 U. S., 440; quoted with approval in *Eastern States Lumber Assn. v. U. S.*, 234 U. S., 600.)

and in 1360 specifically to labor combinations "of Masons and Carpenters and Congregations or Chapters" (what we now call unions). But before all these statutes the common English law was shown in a case which is recorded in 1221, when the Abbot of Lille-shall went to court and complained "that the bailiffs of the town of Shrewsbury had made many injuries against his liberty (*i. e.*, his constitutional right freely to conduct his own business) in that they have caused proclamation to be made in the town (thus recognizing the mere threat of a boycott as an unlawful act if made in combination) that none be so bold as to sell any merchandise to the Abbot or his men upon pain of forfeiting ten shillings." He won his case; the court held that it was what we should call a trade boycott against his liberty of trade; and it was the *intent* of the combination that made it criminal, for the defendants themselves admitted that had they combined with the intention of injuring the abbot it would have been an unlawful one, but denied that fact. We may add that, coming down to the most modern cases, it is the *first* or immediate object or intention that the courts should alone consider.* This is the test, in cases where the combination has also a lawful end, as, *e. g.*, to raise wages. Thus, in the Buck Stove Case, the *first* object of the defendants was to prevent their friends from trading with the plaintiffs; only after

* On this whole subject the author may be permitted to refer for a full discussion to his address before the Indiana State Bar Association at Indianapolis, 1910—"The Law of Combined Action and Possession," reprinted in the *St. Louis Law Journal* for that year.

that could they hope to benefit themselves. On the other hand, a simple strike to raise the wages of the strikers obviously has that perfectly lawful end for its first object, though it may be intended as a method of constraining the employer's actions in other ways, or be part of a general trade dispute. So in a case below cited, the *first* object of the conspirators was to discourage enlistment in the United States, only secondarily or remotely to help the Russian revolution.*

In 1436 a statute uses the exact modern words: "all by-laws in restraint of trade are declared unlawful and void. No guilds or corporations shall make unlawful ordinances as to the price of their wares for their own profit and to the common hurt of the people"; and in 1536 appears the provision that by-laws of the guilds restraining suits at law are unlawful, that is to say, if a man is deprived of his rights in a trade-union, no by-law of the union may prevent his appealing to the courts. This is law to-day.

Though the old common-law offenses of forestalling, regrating, and engrossing may be deemed obsolete so far as individuals are concerned (see p. 129), they would be unlawful to-day if done by a combination. The principle that a trade combination could not be formed or even a corporation created to make undue profits, "corner" the market, buy up any necessary of life and hold it at an exorbitant price, or for the purpose of suppressing competition or acquiring a monopoly, was very early established, certainly by the twelfth

* *Abrams v. U. S.* See p. 151.

century, fully debated in the great East India Case, and re-recognized in the Standard Oil Case* and extended in the Northern Securities Case† to cover not only a combination of several but a single corporation if created for the purpose of evading the common law and the Sherman or Antitrust Act which extends the principles of the common law to interstate commerce.

The law of monopolies (which also rest on combined action for a common purpose) is based on the same principle and had parallel growth. They were always abhorrent to the general principle of freedom of trade, their fostering by guilds was, as has been seen, sedulously forbidden; and there probably never had been any legalized monopolies before Elizabeth. Anxious to raise money for her wars, she discovered the idea of granting patents; that is to say, giving a license to a certain man or company to tax a certain trade, deal solely in a certain commodity, or manufacture a certain article, with the implied promise that no one else should be allowed a similar right, particularly in the case of charters to corporations; the first trading corporations were created for that purpose. In 1606 patents began to be granted for the exclusive sale of articles, even those which were not inventions, which, with copyright, were and remain the subject of justifiable legal monopoly. So it was only twenty years before the great Statute of Monopolies was passed, prohibiting such monopolies whether granted or to be granted, giving remedy in double or treble damages to

* 221 U. S., 1.

† 193 U. S., 197.

any one injured, just as our Sherman Law and State antitrust laws do to-day. Express provisions against monopolies, under that name, are incorporated in the Constitutions of several Western States,* but were hardly necessary, as the principle is as old as that against restraint of trade, and if anything can be said to be part of the "unwritten constitution," it is the right to be protected against all monopoly, State-chartered or private. The great mine of information on this subject is the real Great Case of Monopolies (not the playing-card case, the one commonly so called) which is the *East India Co. against Sandys*, in the seventh volume of *State Trials*, p. 513, in which it was admitted that a monopoly, even by royal charter, was, in England, against the common right; and that the question whether combinations or agreements were monopolistic was determined either by the intention or by their necessary result.

The English law against conspiracy should not be abolished or legislated away; for it is based not only on the profoundest public policy and common sense, but is the one great domain of the law of private right which is based upon and tested by the moral law, rising to the highest standard of duty to one's neighbor and to the State.

And as to monopoly, especially as the Federal Constitution gives no express protection to the individual,

* Those interested in these constitutional provisions may find them all collated in the author's *Law of the Federal and State Constitutions*, pp. 339-341 (Boston, 1908).

these great principles of the common law should not be forgotten, but enforced by the courts as part of the right to property guaranteed to him in the Fifth and Fourteenth Amendments. In matters of interstate commerce he is of course relegated to the Sherman Act, which only in part applies to it these ancient common-law principles. The individual may not sue directly to break up the trust, nor may he defend an ordinary action brought against him by it, as for goods sold by it to him, on the ground that the trust is an illegal body, despite State statutes to that effect; he can only get his threefold damages in cases where a competing or boycotting trust works injury to his own business.*

* *Connolly v. Union S. P. Co.*, *supra*. But in the Great Case of Monopolies Captain Sandys defended on this ground an action brought against him by the East India Co. for damage for invasion of its monopoly to trade with India. All the great jurists in England took part in this decision (1683), and we owe the preservation of their arguments to Mr. Samuel Pepys.

CHAPTER VIII

FREEDOM OF SPEECH, THE PRESS, RELIGION, AND THE HOME

The last of these cardinal, sometimes called natural, rights is the right of conscience: the right to the free exercise of one's own religion, with the corresponding right not to be compelled to adopt or support any religion, submit to any sectarian education, pay taxes for any church; and the right not to be deprived of any privilege or office on account of one's religious sentiments. No American of the old stock need be told this. It is the principle which brought about the settlement of our country; and although at first our Puritan ancestors endeavored to enforce their own sectarian doctrines on others, that attempt was soon given up, and the denial of it forms one of the cornerstones of the Declaration of Independence and the Constitution. It is not yet a constitutional right in England, though the tendency for the last two centuries has been to realize complete religious liberty; the Established Church still remains, with special privileges. Religious rights do not justify, under the guise of religious belief, crime or practices inconsistent with the safety or well-being of the State.

In closing our discussion of these so-called natural

rights we should note that they were thought by the founders, and there has been many a dictum of our high courts since to the same effect, that they stand on a different basis from those rights which had to be expressed for the first time in our written Constitution. There was a very general belief that, as the heritage of English liberty, they lay behind and above the written Constitution that we were about to adopt; the Virginia Constitution, which preceded the Federal, expressed this by saying that these rights are inalienable and that the government itself is only instituted to secure them; they cannot be supposed to be surrendered by the people when they come into this or any other government, because no equivalent can be given for them; and that whenever or wherever a government fails to maintain such rights, any individual or the people have a right to change it; thus giving, as it were, a constitutional right to revolution.

This exaltation of man's natural rights above the Constitution and this implication of all English constitutional principles into it is the meaning that was intended by the Ninth Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Whether this doctrine be accepted or not to-day one may hazard the opinion, justified by past experience, that no conceivable question of natural right can ever arise which the courts will not, and justly, be able to find covered and protected by the wisely abstract phrases of our written Constitution.

But besides these cardinal rights there are other constitutional rights of English freemen, many of which are quite as old, and which only differ from the "natural" rights in that they are derivative from them, or from events in our past history, or are political or military or judicial. The first, political, we shall omit from consideration in this book, which is not concerned with the Constitution as a frame of government. The right of association and the right of the individual to be protected, both against it and monopoly, we considered in the last chapter. Of other miscellaneous rights, freedom of speech probably grew out of the freedom of parliamentary debate, which only got finally established under Elizabeth; it is not otherwise a right recognized in the English Constitution, except so far as goes the political right of assembly—one of the four rights insisted on by the first Russian Douma—though as to political matters it appears as well established in England. But with us it is recognized as a general right in the First Amendment, and is in all the State Constitutions. Freedom of the press—of unlicensed printing, as Milton called it—became more definitely established there, so that a man may write or print or publish what he will on all subjects, being responsible only for libellous matter or such as has been constitutionally forbidden by a prior law or order of court. The important thing of course is that newspapers, etc., may not therefore be suppressed or their contents submitted, in time of peace, to a prior censorship (though they may, under certain circumstances, be

withheld from the privileges of the mails). There is generally no distinction made between the two rights, speech and the press, in American Constitutions. Neither liberty, of course, protects a man from criminal or civil prosecution for what he has said or published; and the exercise of either liberty may be lawfully enjoined (like that of any other; free locomotion, for instance) or prohibited by statute as part of a line of conduct tending to criminality.* Many cases of this sort arose during the Great War as to unpatriotic speaking or writing; and they almost always arise in cases of boycott or labor strike. Thus, the right of free speech does not cover false and malicious misrepresentations of the objects and motives of this country in entering the war, made in a public speech for the purpose of discouraging the enlistment of troops, and a Minnesota statute forbidding such was sustained.† So, in New York, the Federal "espionage" act was invoked and defendants tried and found guilty of conspiring to distribute socialistic pamphlets against the war.‡ And the jury are to find whether the pamphlets had in fact such effect. In another case where actual, though garbled, despatches were published, the court refused to set aside a verdict of guilty found by the jury though differing with it in their conclusions upon

* Thus, a newspaper which advocated open-air mixed bathing under the title "Nudes and Prudes" was held not protected by the Constitution against a statute forbidding the publication of articles inciting the commission of any crime (here, indecent exposure). (*Fox v. Washington*, 236 U. S., 273.)

† *Gilbert v. Minnesota*, 254 U. S., 325.

‡ *Pierce v. U. S.*, 252 U. S., 239.

the evidence.* (Owing to ancient abuses of the prosecution for libel in England, we have it established as a general constitutional principle in the State Constitutions that the jury are to determine in such prosecutions both the facts and the law; *i. e.*, the bearing of the facts, under the direction of the court; but this is not in the Federal Constitution.) So certain Russians were found guilty of publishing in New York circulars in Yiddish, attacking the government for carrying war into Russia and urging a general strike, and the act was held to apply,† although the immediate purpose was to help the Russian revolution. And in the Buck Stove and Range Case‡ Mr. Gompers was sentenced to imprisonment for contempt of an injunction against publishing in a labor journal the name of the plaintiff in a "We-don't-trade-with" list, though he pleaded freedom of the press and liberty of trade; such publication might be forbidden as an act, otherwise lawful, which formed part of an unlawful conspiracy to injure the plaintiff's business.

Conversely to the right of freedom of speech, is there (as in the case of the so-called right to privacy, p. 157) any constitutional right not to be compelled to speak (except, of course, in the course of litigation, congressional inquiry, etc.)? The States have very commonly statutes prohibiting blacklists, etc., but there would appear to be no constitutional protection against them except when they amount to a conspiracy against the

* *Schaefer v. U. S.*, 251 U. S., 466.

† *Abrams v. U. S.*, 250 U. S., 616.

‡ 36 Wash. L. R., 822.

constitutional right to labor or trade. And a statute of Missouri was sustained as constitutional under the Fourteenth Amendment which required a "service letter" in a prescribed form to be given to every employee who was discharged or quitted service of a corporation employer, as corporations are not guaranteed freedom of speech by the Federal Constitution, and there is no such thing as "liberty of silence," and their liberty of contract was held not to be affected. But the Chief Justice and two other justices dissented.*

The important political right of assembly and petition is rather the origin than a derivation of freedom of speech, and is also related to the general political right of an English freeman. It is recognized first clearly in the English Bill of Rights, and generally in American Constitutions, and forms an indispensable part of the political liberty enjoyed by Anglo-Saxons. Indeed this, with the right to bear arms, has always been the essential difference which has attended revolutions or popular reforms in England from those in other European countries. Without these rights they were, as formerly in Russia, easily suppressed. The other principal political rights of the individual may be summarized, besides the general right to vote, as that of equal representation in representative assemblies with correlated provisions for free elections and for the judgment of disputed elections by the legislative body itself, not by the executive, nor even, unless the legislature so enact, by the courts. So, when Senator Newberry

* *Penna. Ins. Co. v. Cheek*, 259 U. S.

was convicted under an Act of Congress for excessive expenditure of moneys to bring about his nomination for Senator at the primaries, it lay with the Senate to vote whether to unseat him or not. They voted to seat him; and the Act of Congress was afterward held unconstitutional, five justices against four holding that the Federal Government had no power to interfere with mere nominations of candidates, but only with actual elections.*

All of our State Constitutions, but not the Federal, include the right to education among constitutional rights. And all publicly supported education must be non-sectarian.

Compulsory education is required up to the age of twelve or eighteen by the Constitution of a few States, or a public-school term of three, four, or six months required; most State Constitutions now provide for a State University, or recognize one already established; such are Harvard, Yale, William and Mary, Southern (for negroes) in Louisiana, and Leland Stanford. In several States it is now specified that the instruction must be in English, and the radical tendency to State control has recently shown itself in several State laws forbidding instruction in all schools in any foreign language to children under a certain age or grade; and another law, in Oregon, forbidding private schools entirely. The former laws have just (June, 1923) been declared by the Supreme Court null, as counter to a natural right guaranteed by the Fourteenth Amend-

* *Newberry v. U. S.*, 256 U. S., 232.

ment; the latter law is not yet passed upon.* Unless checked, this tendency will spread, or the same results be obtained by an Amendment to the Constitution placing control of education among the Federal powers.

Even more important than freedom of speech to personal liberty is the right of the people to be secure in their houses, free of molestation, and to keep their private affairs to themselves. "An Englishman's house is his castle." Under the Fourth Amendment, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." As Magna Carta put it, "nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land"; no government official, from the king down to the nearest police officer, can enter your house or search your papers without such precise warrant; "general" warrants, the exercise by the government of the power to search places or to seize persons or papers with no specific charge and without a sworn warrant specifying an offense, the persons to be seized, and the objects of the seizure, were held unconstitutional under this principle in the case of the "Writs of Assistance," originating in Massachusetts at the time when General Gage was sta-

* *Meyer v. Nebraska*, June 4, 1923; *Bartels v. Iowa*; *Bohning v. Ohio*; *Pohl v. Ohio*; *Nebraska Lutheran Synod v. McKellie* (decided same day).

tioned in Boston, and the decision of her courts was later affirmed by Lord Camden in England, so that this may be said to be a definite constitutional principle given by America to the mother country. It is even more elaborately expressed in the Bills of Rights of both Massachusetts and Virginia (1780, 1776, respectively).

Closely related to this, perhaps the origin of it, is the older principle that a man shall not be compelled to testify against himself, one of the corner-stones of English liberty.* And papers or evidence thus seized or improperly secured by the government without such particular warrant cannot be made the basis of any prosecution, although, it appears, if the government comes into their possession without fault of its own, they may. But there was a strong dissent on this point, and the matter may not be considered settled. Anyhow, no evidence can be used which was

* The protection of the Fourth Amendment applies to all alike, whether accused or not, and papers improperly seized cannot be used. Lord Camden's opinion affects the very essence of constitutional liberty and security, forbidding invasion of one's indefeasible right of personal security, personal liberty, and private property. "Both the Fourth and Fifth Amendments contemplate perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fulness of their integrity, free from the possibilities of future legislative change." (*Weeks v. U. S.*, 232 U. S., 383, 391.)

The principle has been much in the public eye of late, owing to the efforts of overzealous prohibition officers to evade its provisions. They have been sternly disavowed by the courts; convictions secured by such means have been set aside, and even the liquor confiscated ordered restored to the owner. And though the prohibition agents gained entrance to the defendant's house on the express permission of his wife, the search was held illegal. A wife cannot waive her husband's constitutional privilege.

obtained directly or impliedly under compulsion, as was decided in the beef-trust cases.*

Englishmen have always had a general objection to inquisitions, visitatorial expeditions by King or state officer, going straight back indeed to the great clause of Magna Carta. A man's private affairs cannot be looked into, nor his papers searched, except in judicial proceedings (it is questionable how far, if at all, he can be compelled to testify or reveal such matters to a mere legislative committee),† or upon the charge of some definite offense, with a specification of the precise papers expected to be found; while even then he may refuse either to testify or to furnish documentary evidence if it may reveal him guilty of some crime, unless under a statute guaranteeing him immunity not only for the offense charged but for all offenses that may be revealed by the process, directly or indirectly, either in that court or in any other court of the same sovereign. But, when papers have been lawfully got, under a proper search-warrant, for one offense, their evidence may be used to convict him of another.‡

* *Armour v. U. S.*, 209 U. S., 56.

† Quaere, whether Congress can compel testimony to get information for legislation: *Henry v. Henkel*, 235 U. S., 219. The usual power given to congressional committees, commissions, etc., "to send for persons and papers" is somewhat in the nature of a "bluff."

But the criminal is not the judge as to answer to what questions may incriminate him, but the court. (*Mason v. U. S.*, 244 U. S., 362, 365.)

‡ The Fourth and Fifth Amendments are to be liberally construed and protect a man against the search of papers by force, or stealth, or threat by government officers, without warrant, and the use of their contents against him in a criminal prosecution. (*Gouled v. U. S.*, 255 U. S., 298.) And in the historic case in England, a search may not be justified merely to obtain papers which may be evidence of a criminal offense.

This immunity does not, however, have to be extended from State courts to Federal courts and vice versa; so that evidence obtained in either may be the basis of prosecution in the other, and that without placing the man twice in jeopardy if he have already been tried for the same offense.* Nor is the privilege one which may be claimed by corporations,† which by the very fact of their charter are subject to government visitation. Nor does it extend to information required of a man to determine the amount of the tax or revenue duty for which he is liable; so, our income-tax returns are compulsory; and a man may be prosecuted for perjury if his books show them to be false though their exhibition be compelled.

The privilege, of course, only relates to the danger of criminal prosecution; a man can be compelled to testify in a civil case; nor is he the judge as to what question would be incriminating if replied to. Nor can it be extended to cover a general right of privacy, either of possessions or person; as, for instance, a man's doings in his home or a woman's control of her photograph, however much that is to be desired. Such protection must be afforded by statute; it has been held not to be included in the constitutional principle.

A cardinal principle we discussed under the right to law was that of indictment, and of jury trial, in crim-

* And a State may inflict increased punishment for a second offense, though the first, against the United States, was full pardoned by the President. (*Carlesi v. U. S.*, 233 U. S., 51.)

† Corporations are not protected under the Fifth Amendment from the compulsory production of incriminating documents, but are, under the Fourth, from search and seizure without warrant. (*Silverthorne Lumber Co. v. U. S.*, 251 U. S., 385.)

inal cases; that a freeman may not be tried for a crime without the finding of twenty-three of his peers that there is probable cause for believing him guilty, nor found guilty but by a unanimous verdict of twelve such. And after he has once faced those twelve he is in jeopardy and can never be tried again for the same crime unless the jury disagree, or (by a recent Act of Congress) the government appeal successfully for some error in law in the conduct of the trial. Of course the person tried could always appeal; but the government could not. A man is presumed innocent until found guilty by a jury; if not so found he is not guilty, though he confess straight after. Beginning prosecutions by "information" of the Crown was strenuously objected to by our ancestors, but that method has been restored in many of our Western States, and may have to be in others when grand juries persistently fail to find "true bills" in flagrant cases.

Immediately upon the first arrest a man must be told the nature of the accusation, is entitled to immediate and not excessive bail if the offense be bailable, to a speedy trial with the right to have counsel, to be present throughout, to be confronted with the adverse witnesses, to have compulsory process for producing his own, before a jury of the neighborhood. All this is in the Sixth Amendment. By the Seventh the right to jury trial in civil cases of over twenty dollars in value is preserved, and no fact tried (or triable?) by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the com-

mon law. By the Eighth, besides the prohibition against excessive bail taken from the English Bill of Rights (that having been a favorite method of oppression of the Stuart kings), is the one against cruel and unusual punishments. "Electrocution" has been held not to be such; but all torture has been considered to be so in modern times. Flogging is still permissible in a few States.

Bills of attainder, both to the State and Nation, are forbidden in the body of the Constitution; this, as has been before mentioned, another favorite method of Stuart oppression, was the finding a man guilty of an offense punishable by death (if less than death it was called a Bill of Pains and Penalties) by legislative act or even royal decree. The former made a man an "outlaw," as in early times we have described, and forfeited his estates, so that nobody (corruption of blood) could inherit from him. They were much dreaded by our ancestors, but would appear to be obsolete now; yet one must not be hasty in discarding constitutional protections. One of our recent Presidents made threat of disqualification to hold all office (which was one of the consequences of such bill) to the members of a certain regiment, and a very recent decision of the Supreme Court has said of a State law that it was in effect such.*

* The legislature cannot so change the burden of proof as to make one individual presumably guilty of a crime, *e. g.*, any person systematically paying in the State less than he pays in other States for sugar, and Holmes, J., likens such a law to a Bill of Pains and Penalties. (*McFarland v. Am. Sug. Co.*, 241 U. S., 70.)

Bracketed with the provision against bills of attainder is that against *ex-post-facto* laws, made to punish crime. There is no corresponding provision against retrospective laws, applying to civil matters, however unjust they may seem to be. The famous clause against a State's passing laws impairing the obligation of contracts comes nearest to it. Treatises are written upon this; it has been more often relied upon perhaps by private litigants for property rights than any other sentence of the Constitution,* though now the Fourteenth Amendment affords an even more universal shield, protecting liberty as well as property rights. For any dispute concerning the Constitution must be tried, if either party so wish, in United States courts, of which the justices and judges (copying the latest British constitutional document, the Act of Settlement, exacted after long experience of the interference of kings with judges) have to be appointed for life and are not removable during good behavior. Unfortunately this constitutional principle was not adopted by the States, save in Massachusetts and a few others.

And, finally, the United States guarantees to every State a republican form of government; and, upon the

* That this clause would prove to be "the bulwark of American individualism against democratic impatience and socialistic fantasy," says Sir Henry Maine. (*Popular Government*, p. 247.) "The declaration of the Constitution . . . against the power of a State to impair the obligations of a contract . . . is paramount, not to be weakened by refined dialectics or bent to some impulse or emergency 'because of some accident of immediate or overwhelming interest which appeals to the feelings and distorts the judgment.'" (Holmes, J., in *Northern Securities Co. v. U. S.*, 193 U. S., 400.)

application of the State legislature, or the governor if it be not in session, against domestic violence.

But what is a republican form of government is a political question* with which United States courts have nothing to do. So far as they are concerned, a State may abandon representative government and have all laws made by initiative and referendum, do away with legislatures, abolish the principle of the threefold separation of powers, and have all laws made, executed, and adjudged by a commission. Not the courts, but the President or Congress must decide. And, finally, though a constitutional amendment might even do away with this guarantee of a government republican in form, it could not deprive any State of its right to two Senators. If that be taken away, even by constitutional amendment, a State can, constitutionally, secede!

Virginia—probably a majority of our thirteen States

* In the *Dorr Rebellion Case* in Rhode Island the right of the people of a State to make a constitution was held sacred, while leaving it a political question to be determined by the (Federal) executive which in fact was the lawful government. (*Luther v. Borden*, 7 How, 1.) In *Marshall v. Dye*, 231 U. S., 250, the Supreme Court of Indiana had enjoined State officers from submitting to the voters a new constitution drawn up by the State legislature, contrary to the method prescribed in the previous State Constitution. It was argued for the State executive that to have the judicial power coerce the executive was counter to the threefold principle of the Constitution, and to a republican form of government, and that therefore the United States Supreme Court had jurisdiction under this article (IV, 4) of the Federal Constitution; but the court held that it could only be enforced by political action, by Congress or the President. Moreover, only those having a personal as distinguished from a political or official interest can ask this court to review the judgment of the State court on the ground that a Federal right has been denied.

—thought they had by the Ninth and Tenth Amendments, put the cardinal human rights in the same category. It is perhaps too early still to say they were wrong.

We have now taken a couple of hundred pages to describe constitutional rights, every one of which touches the individual in his daily life, protects but these simplest rights of free and civilized humanity. We have tried to show that our written Constitution is in no part obsolete, and in every part suited to our present need. It is a catalogue of the inhibitions on tyranny, not of any inhibition on individual liberty. It is a negative on both governments, State or National, of what they may not do; no line of it is to tell mankind what they shall or shall not do. Its political side, which we have omitted, may be freely amended; its human side not. We pass therefore to a consideration of the changes now proposed. The danger to it is by fallacious amendment, embalming in its folds for all time the dead hand of a present will.

CHAPTER IX

THE DIVISION OF POWERS BETWEEN THE FEDERAL GOVERNMENT, THE STATES, AND RIGHTS RESERVED TO THE PEOPLE

Our Constitution originally gave the Federal Government no power of imposing taxes directly on the people, nor of holding or even controlling the ownership of land, nor of trying a man, except in specified cases, for crime, nor, generally, to act directly on man's life or conduct. These facts will show that it was not supposed to concern itself with his domestic affairs. How widely have we departed from this notion! Yet it is the Constitution that expresses the permanent will of the people; laws are merely the opinion of a present majority of their representatives; and it is the people who are supreme, not their legislature, as in England, nor the Executive, as in autocracies. Still the Federal Government, as such, has no direct power over the States except to maintain a republican form of government. The term States' rights is a misleading one to-day, because, since the war between the States, we are apt to think of it solely in connection with the discredited right to *secede*. All other rights of the States, as all rights of the people, remain as they were, save the four altered by express amendment—

that the States may not make laws against the negroes nor restrict them nor women from voting; that the Federal Government may impose a direct income tax; and shall prohibit, and may directly control individuals, making or trading in intoxicating liquor. It is still true that the National Government is not omnipotent, has not all sovereign powers, and that ultimate sovereignty rests with the people, speaking through written constitutions, the National one controlling the State's, if the two are in contradiction.

It has been said that the Constitution is in no part obsolete; and nothing shows this more clearly than the way in which first one, then another, of its leading principles springs into prominence in protecting us against tendencies dangerous to our Republic as administrations change and new impulses arise. Thus in the first edition of this work, published in 1908, much space was given to the explanation of those constitutional provisions which protect the people as well as the States from undue extension of power by the National *Executive*. President Roosevelt was impatient of any "twilight zone"; or indeed of any zone of power reserved to the people or their home governments which was withheld from the Federal Government, and prevented it, or him, from acting, as well as thinking, "nationally";* and he was more than willing to aggregate to the Executive, by administrative agencies,

* The opposite view is well expressed by Chief Justice White in his dissenting opinion in the Northern Securities Case, rendered about the same time: "No remedy in my opinion for any supposed or real infirmity can be afforded by disregarding the Constitution, by destroy-

powers and functions which had normally pertained to the States, or even, when properly within the Federal power, to Congress or the courts. He was impatient of judicial decisions; and he thought that all the powers which have, in European history, been exercised by sovereign states, even if autocracies, ought necessarily, and as a matter of course, to be exercised by the American Federal Government, and preferably by the Executive thereof.

Fifteen years have passed by, and though President Wilson, under pressure of the war, became somewhat of the same temper (it would seem temperamental with all our great Presidents, Washington and Grover Cleveland alone excepted), we are now confronted by an entirely different set of dangers, and through Congress, not the Executive. But just as President Roosevelt wanted his ends—usually excellent in themselves—right here, and now, and throughout the whole country, by sweeping reform, and was impatiently ready to cut the Gordian knot of State bonds and constitutional ties, his temperament in this respect singularly feminine, so it may be apprehended that the mass of women voters will be of the same way of thinking. It were almost fair to say, of not thinking: with a concrete end in view, worthy in itself, they may, thoughtless of all else, press down the easy highway that leads to the centralization, and hence finally to the destruc-

ing the lines which separate Federal and State authority, and by implying the existence of a power which is repugnant to all those fundamental rights of life, liberty, and property upon which just government must rest." (193 U. S., 399.)

tion, of our great Republic. For every thinker, from Washington or Marshall, Jefferson or Jackson, down to De Tocqueville or Bryce, has seen that the one would follow rapidly on the other. Complete centralization in so vast a country as ours is incompatible with popular liberty; even Russia teaches us this lesson; and in all countries entire centralization has led ultimately to the power of the Man or of the Mob, and government by laws, not men, has vanished. Present-day France, small, homogeneous, and held together by the binding cords of common danger, has not lasted long enough to be counted an exception. And we are far more like China, or Russia, or the Roman Empire, in our internal structure, than like France.

And although for the present the danger of *Executive* usurpation of power seems removed, the danger remains, and is all the greater (for it has nothing to oppose it), of a Federal usurpation—the word is hardly too strong—created by *Congress*, enlarged or extended indefinitely by sweeping constitutional amendments. Particularly is this to be apprehended under the clever device of bribing by a Federal appropriation the States to give up their constitutional rights. Not only is the bribe in itself a cheat—for though the nation give 50 per cent of the money, that 50 per cent is taken from a few States mainly and mainly spent in others, as is the other 50 per cent raised by the States themselves—but if such largess to the poorer States be justifiable, the tax for it should be open and direct, that our people, already too heavily taxed, may understand it.

And this money objection is trifling beside that great other objection already explained: that all these Federal administrative boards or commissions, brought into being to administer and extend these appropriations, never die, always try to increase their growth, and surely and steadily sap the vitality of the States, relieve the people of their sense of responsibility, deprive them of their rights as well as power, and will end not only by destroying local government but self-government itself.

Now this is the principle with which our Constitution was most of all concerned; and every such measure denies its basic principle. For we must always remember that an analysis of the document shows that it is largely composed of negatives; that is, what the Federal Government or State Governments may *not* do, powers that are kept by the people in their own hands until they choose to amend the Constitution. The things reserved to the people are as many in number and even greater in importance than those delegated to the Federal power. "We the people" are the only judge of what are "the people's rights and what are the people's wrongs"; it is not for the Executive, or even Congress, to judge of the Constitution or what is "working for good government"; and Roosevelt, in his book on Cromwell, criticises the Protector for doing this.

We have therefore three great divisions of power: power of the Nation, power of the States, and power reserved to the people. And consequently we have two

great categories of power forbidden, to the State or to the Nation (nothing is forbidden to the people; they may take all power of government away and become anarchist; or indefinitely increase them and become socialist; or hand all power to a class and become bolshevik). What is the exact division of these powers? They may be graphically shown by a chart (see plate before index). Leaving outside those powers of governments regardless of cardinal human rights, like the bolshevik's or the Eastern autocrat's, let us consider all reasonable governmental powers as included in the great circle, representing all the powers possible to a free and civilized government, whether political, executive, legislative, or judicial. For the basic idea of our American Republic is that it shall not have unlimited power—therein improving on Plato's. Congress is not omnipotent, as is the British Parliament, but its powers of legislation are definitely limited to seventeen subjects; now, by the Eighteenth Amendment, made eighteen; and to such laws as "are necessary and proper" for carrying into execution both these seventeen powers and all other powers which are given by the Constitution to the United States Government. As the function of the central government was to be mainly political, so most of these powers were political.

First we find the power of the Federal Government to raise moneys, by "Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Now this last phrase is generally misunderstood. It

is spoken of as if it gave Congress power to pass any law that is for the general welfare of the United States. But it is merely a limitation upon taxation, and only says that all *taxes* must be for the general welfare, etc.; and this, as we have seen, is the oldest English constitutional principle. Because the tax is constitutionally imposed, it does not follow that it makes constitutional a purpose, or action, or function of the Federal Government not authorized by the Constitution. And, as we have seen, the object of the tax must be to raise money, not to destroy an industry or a business not otherwise under Federal control.

Then we have the usual sovereign right to borrow money, regulate the coinage, weights and measures, punish counterfeiting; to declare war, but only by Congress, and therefore to support armies and navies (but no regular army to last more than two years without a new Act of Congress); to call out the State militia to execute the laws of the Union, suppress insurrections, and repel invasions. This is the only case where under the Constitution Congress can, as it were, give orders to a State; and when the militia are thus called out, Congress has power to govern them. Then the Federal Government can, through Congress, define and punish felonies committed on the high seas, and offenses against the law of nations. It can create and govern a District of Columbia, also all places purchased with the consent of the State legislature for forts, dockyards, magazines, arsenals, and "other needful buildings." It may regulate naturalization,

and may regulate bankruptcy (otherwise the States may, and did, do so); establish post-offices and post-roads; and grant patents and copyrights good through all the States. All these powers are given to Congress, as well as the power to make "all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." This last phrase, like the general-welfare clause, has been utilized by the advocates of indefinite centralization; and the Supreme Court has often held that, while the clause means what it says, Congress must be the judge; and if a means provided by a law be both necessary and proper, have some clear relation to a constitutional object, the court will not consider whether it be the *most* proper way of attaining that end.

Of these seventeen expressed powers given to the Federal Government and placed in the hands of Congress by the Constitution, all but three may be called political, or concerning international relations—bankruptcy, the power over post-roads and the mails, and over interstate commerce are the three exceptions which with the control and prohibition of the manufacture or trading in intoxicating liquor, under the Eighteenth Amendment, may be called internal, or social. And it is no coincidence that these three or four matters which form the exceptions to the general rule that the powers of the central government are to be political or external have caused more doubt and

led to more litigation than all the other fourteen clauses put together. Federal jurisdiction in bankruptcies has generally been accepted as necessary. But control of railroads through the post-road clause, of business in general and the right of free printing by the power to exclude from the mails, is debatable and still litigated; while the power to "regulate commerce among the States," the five words in the Constitution still most discussed, has given rise to more litigation than any clause in the Constitution, not excepting the Fourteenth Amendment and the clause protecting contracts against subsequent State legislation. Under it has been attempted the Federal control, even to actual prohibition, of private industry and property right, even of individual liberty rights, to the invasion of the police power reserved to the States. Private conduct and private liberties have thus been sought to be brought under Federal rule. Thus, as to anything that may be connected with interstate commerce, the whole doctrine that the central government's powers are political or international only may indirectly be got rid of. The Supreme Court has only partly checked this tendency; on the one hand, it has refused to countenance the attempt of Congress to substitute its judgment for the State's in labor matters; but on the other, it has invaded the State's regulation of ordinary matter of personal conduct.*

* In *Caminetti v. U. S.*, the "white slave" case, the majority of the court sustained a statute punishing an offense also a misdemeanor under the State law because committed in the course of travel between the States or because interstate travelling of the person concerned made

Let us now draw across our great circle a zone of powers thus expressly given to the Federal Government. We will color it dark blue, and call it Zone A. Then we will draw a Zone B, partly intersecting A (for some powers are common, concurrent, to both); this we will also color blue (this color being used for things permitted), but a lighter blue than in the case of the National powers; the segment where these two zones intersect will thus be distinguished by a darker blue than either. Of course, few things needed to be expressly permitted to the *States* in our Constitution; for the general theory is that all powers not expressly reserved to the people or the Federal Government are left to the States. The segment AB, where these two zones of permission overlap, will, as just explained, perfectly represent such powers as may be exercised by both State and Nation, are common to both, as in the case generally of the power of taxation; or are concurrent, as is the control of the liquor trade under the Eighteenth Amendment. These powers are important; but comparatively few had to be expressly mentioned in the Constitution, the general theory being that a power given to the Federal Government may also be exercised by the States unless expressly or by implication denied to them. (A rough enumeration of the clauses of the Constitution covering matters falling in each respective zone and segment is noted in our

it possible. The Chief Justice (White) and Justices Clarke and McKenna dissented on the ground that the statute was only aimed at commercialized vice, or, if not, that it was unconstitutional. (242 U. S., 470.)

diagram; it will be noted that only four such are expressed as belonging to the Zone AB, and three to B simple.)

Now these blue zones, Federal, State, and joint, cover all the powers permitted to our governments by the people who set them up; and if our whole circle represents all possible legislative power, Zones A, B, and their intersection AB will represent the great bulk of legislative or executive power as it has been hitherto accepted in constitutional countries. It does not, on the other hand, permit any principle that is not republican in form, nor anything destructive of liberty, natural rights, or private property, still less those indefinite powers which, being tyrannical, lie outside of our great circle entirely. All such matters, with the various political or legislative powers that are withheld from the Federal Government or the States or both, will find their place in the opposite red and yellow zones of prohibited things, X and Z.

They far outnumber, both in the Federal and, still more, in State Constitutions those things which are permitted. For our ideas of government are not only that it should be constitutional but limited in scope. Man's cardinal rights are saved out; not only from the Federal Government but, by the Federal Constitution itself (and in much greater detail by that of the States), from the State Governments as well. Then the Federal Government is limited, not only by the cardinal human rights enumerated in the first ten amendments and elsewhere remaining with the people, but under our

federative doctrine by powers or rights remaining with the States as well; differing in the latter respect from all centralized, that is to say, all European countries save Switzerland, and in the former from all other governments, even so-called constitutional.

A people may conceivably give—the Soviet Government apparently has given—unlimited power, unchecked by constitutions, or even by natural law, or divine law, or human rights. This, shown graphically, would be an infinite sheet of blank paper; and (as extremes meet) it would also represent anarchy, complete individual liberty with no government at all. When we draw a finite circle, however vast, we indicate the limitation to reason of what we call a free government; our circle represents all possible powers of a sovereign, but free, nation. When we draw a line across part of that circle we indicate a constitutional government; when we further divide it we indicate a Federal. So far, we have done this only as to the powers permitted. Let us now draw other two lines to mark off powers forbidden or excluded from the Nation or the States respectively by the Federal Constitution.

Let us call what is forbidden to the United States X and color it red, and draw that zone directly opposite to the zone of things permitted to the Federal Government; and then call what is forbidden to the States Z, color it yellow, and draw that zone opposite to Zone B, of things permitted to State Governments; Zones X and Z, intersecting as A and B did, become orange, so as to graphically represent those things

which are expressly forbidden to both. For there are very many such; the Constitution, as we have pointed out, consisting mainly of inhibitions. Such things, such powers, still remain with the people; not, or at least not yet, given to either branch of our dual government. But there are certain other matters, those very cardinal rights with which this book is concerned, which are expressly reserved to the people; our diagram works out to show this exactly, for you will see that there is a central area, still white, which shows all those things, all that sphere of possible power, which has not been covered by any of our delegations of power, be it to State or Nation, shown on our chart. Herein fall the Bill of Rights, most of our constitutional amendments, the Ninth and Tenth expressly so stated: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

And our chart will not only show the general powers at a glance; it will indicate still finer shades of meaning. Thus, the area dark blue, A, simply represents those matters or powers delegated in the Constitution to the Federal Government, without any expression in that document itself whether or no they are also forbidden to the States. The Constitution is merely silent on that point; it is left therefore to common sense and court decision where doubtful. But we have at the

other end of Zone A a section AZ where the zone of things forbidden to the States crosses that of things allowed to the United States, the yellow crossing the blue; this will naturally therefore be green, and exactly represent those powers which, delegated in the Constitution to the Federal Government, are at the same time forbidden to the States—this is the proper field of centralization and of permitted interference in foreign affairs, government of our outlying possessions, etc.

And in the same manner Zone B, plain, will represent State rights or power without more, but the segment BX will graphically show those things which, permitted to the States, are at the same time by the Constitution expressly denied to the Federal Government—where the red zone crosses the dark blue, turning therefore to purple. This is the domain of State sovereignty; just as, at the extreme opposite of the permitted powers, we have a segment where the red zone of what is forbidden the National Government crossed the yellow zone of what is forbidden the States, and became orange, or matters forbidden to both. We have therefore eight colored areas, blue, of permission, and red or yellow for prohibition, with their derivative colors, showing with precision all that is given or forbidden to State or Nation by our Constitution, and lastly that most important central area still white. We will mark this Y, as covering those matters and those powers which the people have not submitted to any government.

The determining just in which of these nine areas

any matter falls is the whole matter of the study of American constitutional law. Indeed, it is hardly too much to say that if you can tell which things fall into AZ rather than A, or into BX rather than B, and which into X, Z, or Y rather than either A or B, you can answer every possible question in American constitutional law. (For about simple A or Z, B or X, there will obviously never be any doubt; a thing delegated or prohibited expressly, in the Constitution, to the Federal Government or to the State, will be clearly so.) Even the determination of what are implied powers falls into this same solution; for any power, for instance, not falling expressly or by implication into Zone A must necessarily remain in B, with the States, subject only to one more analytical test, whether it be also forbidden it and should hence fall into XZ or Y; and the practical difference between these last two, powers forbidden to both the Federal and the State Government and powers remaining with the people, is obviously slight.

Although this book is solely concerned with these, X, Z, XZ, and Y, the individual's and the people's rights, the division between A and B, National and State power, is still important to us, for the former is far more likely to remove any matter from control, not only of the States, but of the people. This study of State rights and National powers I said in my first edition and still believe to embody, with that of the people's liberties, the most important matters for the American citizens' consideration to-day; for it will

surely be the principal political issue of this century, hardly excepting that of our international relations; and even they must be decided by the test of whether anything proposed falls, constitutionally speaking, into A or X.

To begin with, let us not be prejudiced by the phrase States' rights, because we associate the use of that phrase with secession. The States never had a constitutional right to secede (except in the case of being deprived of equal representation in the Senate), for the States did not create the United States Government; the people did. And only the people, in a new constitutional convention, can confer such a right. Let us therefore approach the problem with an open mind, remembering both what our founders desired, and what their difficulties were in 1787 and what their past history had taught them. Let us, above all, remember that to deny a power to a State or a Nation because the people wish to retain it as their own right is not in the least a narrow nor an unpatriotic construction of our Constitution. Our ancestors desired to establish for all time a republican form of government, but never to give it imperial powers; and they were equally concerned in establishing human rights against tyranny, or even careless sacrifice, by their own Congress. And every one of the powers they thus refused to the Federal Government, and later by the war amendments to the States, is a power which, in times past, has proved dangerous to the liberties of the people.

The powers forbidden to the United States (simply)

in the Constitution we place in the red zone. Most important is the provision which in effect excludes direct taxation (I, 2 (3)). Then we find the old English constitutional principle that moneys must be voted or taxes imposed by initiative of the popular house (I, 7); that Congress must assemble at least once each year (I, 4); that Federal punishment by impeachment shall not extend beyond simple removal from office and disqualification (I, 3 (7)); that office-holders may not be members of Congress nor Congressmen or Senators named for offices created or with salary increased during their term (I, 6 (2)); that taxes must be uniform throughout the United States (I, 8 (1)); that standing armies may not be maintained save under biennial vote (I, 8 (12)); that the Federal Government shall not suspend habeas corpus but in times of invasion or rebellion (I, 9 (2)), or pass any bill of attainder or *ex-post-facto* law (*ibid.* (3)); repeating the provision against direct and capitation taxes, unless placed on the States in proportion to their population (*ibid.* (4)); and that no tax or duty shall be laid (by the Federal Government) on articles exported from any State (*ibid.* (5)). (The recent Pennsylvania law taxing anthracite coal as well as that of Minnesota taxing iron ore* were attacked, not only on this ground but as a tax on interstate commerce.†) Then we have the most important provision, successfully evaded by our interstate commerce, shipping, fuel, and other commissions, that "no preference shall be given by

* June, 1923.

† See below, pp. 199-201.

any regulations of commerce or revenue to the ports of one State over those of another (I, 9 (6)); that all judges shall hold their offices for life during good behavior and receive a fixed compensation, not to be diminished during their term of office (III, 1); and the other great judicial principle that the trial of all crimes shall be by a jury and in the State where the crime was committed (III, 2 (3)); defining the crime of treason and prohibiting forfeiture of the heirs' rights therefor (III, 3). And, finally, that the Constitution may be amended on vote of two-thirds of each House of Congress, but never so as to deprive the States of their equal representation in the Senate (Art. V), nor before 1808, to prohibit the importation of slaves, or permit direct taxation without apportionment among the States. (See in Chapter XI.)

But it is in the amendments, our National Bill of Rights, that the X, or red, provisions are for the most part contained. The first ten were, by prearrangement, proposed before the Constitution was ratified by the necessary nine States. The Constitution itself states that it was "done in Convention by the unanimous consent of the States present" (all except Rhode Island) "the Seventeenth Day of September, 1787." The (old Continental) Congress recognized it as in effect, having been ratified by eleven States, by starting the machinery to elect a President by a resolution passed September 13, 1788; but the Supreme Court held that it went into operation March 4, 1789.* The first ten

* *Owings v. Speed*, 5 Wheaton, 420.

amendments were proposed by the first regular Congress September 25, 1789, and ratified by the eleventh State, Virginia, December 15, 1791; there being then fourteen States, and Rhode Island having ratified June 15, 1790, thus making good her absence in 1787. "There is no evidence on the journals of Congress that the legislatures of Connecticut, Massachusetts, and Georgia ratified them." * (Of course their ratification was not then necessary, any more than it is for Rhode Island to ratify the prohibition amendment to-day.) As these amendments cover most of the rights this book is written to explain, no summary need be attempted; but they may be briefly labelled: the First, as embodying the right to free religion, speech, printing, and political meeting; Second, to bear arms; Third, against quartering soldiers; Fourth, against search, freedom of a man's house; Fifth, the right to law, and personal liberty and property; Sixth, to due process of law, jury trial, and local courts; Seventh, the right to the common law of England, as well as jury trial in civil cases also; Eighth, against excessive bail or cruel punishment; Ninth, that all the cardinal rights still remain with the people, unless (Tenth) expressly given to the United States, or to the States, unless prohibited to them. And the Eleventh (adopted 1798) that the judicial power of the United States shall not extend to the consideration of suits brought by individuals against the State.

* See *Federal Convention*, an invaluable pamphlet, published by the American Peace Society, p. 70.

The intention of those who adopted the Constitution as to National and State power is expressed in the first paragraph of the letter of transmission to the President of Congress, signed, under their authority,* by their presiding officer, Washington.

"The power of making war, peace and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually vested in the general government." That is all.

In the purple segment, BX, where red and light blue cross, the powers given expressly to the States and expressly prohibited the "general government" (to use Washington's phrase) we have States' rights as expressly defined by the Constitution. They include the right of the people in the States to elect Congressmen with the same suffrage qualification as for its own lower legislative branch (under which women could vote for them in suffrage States before the National Nineteenth Amendment) (I, 2 (1)); that the States' representation in the House shall be proportional to population, except the three-fifths' allowance for slaves (*ibid.* (3)); that the popular House shall have sole power of impeachment (*i. e.*, it is otherwise forbidden to the Federal Government) (*ibid.* (5)); that each State must have two Senators (*ibid.*, 3 (1)); that the States shall determine the times, places, and manner of holding all elections for Congress, subject to alteration by Congress except as to the place of choosing Senators

* Miller, *Lectures on the Constitution*, p. 10.

(*ibid.*, 4 (1)); may appoint militia officers and train their own militia, but according to the discipline prescribed by Congress (*ibid.*, 8 (16)); may appoint in such manner as the States' legislature shall direct electors for the President, equal in number to its congressional representation (II, 1, (2)); may demand the extradition of criminals from other States (IV, 2 (2)); they are guaranteed their territorial integrity (IV, 3 (1)) and a republican form of government (IV, 4); and finally the Tenth Amendment, generally reserving States' rights. These are the matters expressed; but it must be repeated that all powers are left with the States when not expressly taken away from them, or, as later prescribed by the Fourteenth Amendment, counter to the cardinal principles of the Bill of Rights; and by the Thirteenth Amendment slavery was forbidden in them; by the Fifteenth and Nineteenth Amendments respectively negro and woman suffrage prescribed; by the Seventeenth their right to appoint Senators in their own way taken from them and a popular vote required; by the Sixteenth the Federal Government is permitted to levy a direct tax on incomes without dividing the proceeds among the States; and by the Eighteenth the States are deprived of their right to regulate the liquor traffic, except by way of enforcing absolute prohibition, as to such liquors as are "intoxicating"—which latter word was defined for them by the Volstead Act.

The corresponding green segment, where dark blue and yellow cross, AZ, Federal powers forbidden to the States, needs little further study. It represents ex-

actly the *National* powers of the United States Government in its sovereignty. The general powers given to Congress in Art. I, Sec. 8 (the eighteen clauses detailed under A), are usually, but not necessarily, exclusive; when made so, by common sense or necessary implication, they of course fall into our segment AZ; otherwise the States can exercise them, at least until Congress, by acting, excludes them; as, for instance, in the case of bankruptcy laws; so the State may also punish for counterfeiting, infringements of the Volstead Act, or even control certain matters affecting interstate commerce, like bridges or navigable streams, until Congress legislates upon the subject. But the States are expressly forbidden from entering into any treaty, alliance, or confederation, granting letters of marque, coining money or emitting paper money, making anything but gold or silver legal tender, passing bills of attainder or *ex-post-facto* laws or laws impairing the obligation of contracts (I, 10 (1)). Also, without the consent of Congress, from laying taxes on imports or exports, tonnage duties, or maintaining armies or navies in time of peace, or, unless actually invaded, from engaging in war (*ibid.* (2) and (3)). The President may command their militia when called into the actual service of the United States (II, 2 (1)). The States have no admiralty or maritime jurisdiction, nor have their courts final jurisdiction in any case involving the United States Constitution, laws, or treaties, ambassadors and consuls (III, 2); and "this Constitution, and the Laws of the United States which shall be

made in Pursuance thereof; and all Treaties . . . shall be the supreme law of the Land . . . and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (VI, 2). And full faith and credit must be given in each State "to the public Acts, Records and Proceedings of every other" (IV, 1); and the members even of the State legislatures as well as all State officers must make oath* to support the Federal Constitution, and there may be no religious test for office (VI, 3). Finally, the citizens of a State may not be discriminated against in any other State, but must be given all the privileges and immunities it gives its own citizens (IV, 2); and they must surrender up fugitives from justice from other States (*ibid.* (2)). And the United States is given power to see that they maintain a republican form of government (IV, 4). These, except the recent prohibition amendment, comprise substantially all the restrictions placed by the Constitution upon the States in favor of the Federal Government or citizens of other States. As has been said, the great restrictions forbidding the invasion by either government of the cardinal rights, at first imposed only on the Federal Government, are now, by the Fourteenth Amendment, usually applicable to both (XZ) though not always; political matters, forbidden to the States under Z, usually fall into

* It does not prescribe before whom the oath should be taken. But perhaps it should be before a Federal official. This is presumably the ground of the Boston *American's* criticism (August 10, 1923) of President Coolidge's taking the oath before his father, a State notary.

that part of the segment marked AZ, permissible to the National Government; and reciprocally the restrictions upon it as to local and individual affairs, X, fall commonly into that part of X, marked BX, permissible to the States.

The things forbidden to the States simply, Z, yellow, are few; under AZ fall those National powers which were reserved to the Nation: matters of war, foreign relations, coinage of money, legal tender, and interstate trade, with one important property right recognized in the body of the Constitution, the clause forbidding States to pass laws impairing the obligation of contracts (I, 10), and the general body of cardinal rights prescribed to them by the Fourteenth Amendment.

This, passed after the Civil War in the supposed interest of the negro, has proved to be, with the exception of the interstate commerce clause, the greatest centralizing passage of the Constitution. For it gave a Federal sanction to the Bill of Rights, and enabled the Federal Government through its courts to control State legislation or official action in derogation thereof, and have the opinion of its courts prevail over those of the States. Much of the radical criticism of the Supreme Court would not have existed but for this amendment. To the conservative it was welcome as giving a double guaranty, now both State and National, of the cardinal rights. But furthermore it has had a great and salutary effect in unifying our law throughout the country, as the State courts have had

gradually to conform to the Supreme Court's views; and of this not the most bigoted upholder of the States'-rights theory can reasonably complain.

And a similar result has attended another clause of the Constitution: that apparently innocuous one giving the Federal judicial power extension over cases between citizens of different States. In 1789 such litigation was rare; people's business seldom extended beyond State lines. To-day it often does in the case of individuals and nearly always in that of corporations, and the great bulk of business is now done by them. And they still, nearly all, work under State charters (for the giving a charter, said Marshall, is a privilege of sovereignty, and was not given to the Federal Government except in the exercise of its own proper functions, such as post-roads, banks, or railroads), and it by no means happens even usually (except as to local public-service corporations) that they take out charters in the State where they do business. The consequence is that a great mass of transactions, and the great majority of business lawsuits, is getting to be between parties who are technically of different States, as it was early decided that a corporation, despite the residence of its shareholders, was a citizen of the State where chartered. Hence a great bulk of business has been transferred from State to Federal courts. If, as has been urged, all corporations, or at least all those engaged in interstate commerce, were compelled or even permitted to take out a Federal charter, this change would be universal and all ordi-

nary business or accident litigation to which on either side a corporation was party would be taken away from the State courts. For it is to be remembered that the corporations usually desire this, preferring Federal to local courts and juries. Still this also would at least tend to a desirable unification of the law; but the State governments would again lose in dignity.

We conclude, therefore, that the two serious recent invasions of State jurisdiction have been, and are, that under the interstate-commerce clause, whereby all industries, even remotely related to interstate commerce, have been sought to be brought under Federal regulation, their labor and their contracts subjected to Congress's views of what is right or permissible, wherever and under whatever different conditions they may be situated; and the even more insidious attempt at Federal control by taxation, under the "necessary and proper" clause, and then the operation, by Federal commissions, of functions hitherto within the domain of private liberties or private right and the jurisdiction of the State and local laws. Of the many invasions now menacing us under proposed amendments to the Constitution we shall speak in a final chapter.

It is interesting, even by the rough test of numbers, to observe what relative importance our Constitution assigns to these several divisions of power. It enumerates sixty-five powers given to the Federal Government, contained in fifty-seven clauses and the Eighteenth Amendment. They are confided to the three

branches of government, legislative, executive, and judicial (named in the order of their importance or dignity as the Constitution places them); nineteen to Congress, while seventy are expressly denied. Though our President has more power than the English King, only seven powers are actually given him by the Constitution; all others are therefore denied. The judicial branch has no power, but to try suits between individuals or States, and it is provided that they must do this according to the Constitution and the English common law; and they are given the constitutional right not to be removed except for bad behavior.

But there are sixty-six things in thirty-nine clauses, forbidden to the United States Government, and eleven more, thirteen with the last two amendments, forbidden both to it and the States; these last remain with the people, the former with the people or the States. Then there are twenty other rights or powers expressly given to States in the Constitution, twelve of which are forbidden to the Federal Government, five may be shared or exercised by both, and three left indefinite. These are of course only those which for some reason had to be mentioned in the Constitution; under the Tenth Amendment all rights not expressly delegated to the United States remain with the States or the people. Forty-three of the sixty-five powers given the Federal Government are forbidden to the States; eighteen may be also exercised by them, at least there is nothing in the Constitution to forbid. Only five rights or powers are expressly so shared: the making a new State out

of States previously existing or dividing an old State must be by joint action of the National Congress and the State legislatures concerned; the right of levying imposts and duties with the consent of Congress; the duty of maintaining a republican form of government; the amending of the Constitution; the enforcement of the prohibition amendment. In only one case can the Federal Government coerce a State, when it ceases to maintain a republican form of government, though, by implication of the Fourteenth Amendment, it may coerce a State if it try to secede.

It is the people that are primarily thought of in the Constitution. The clauses and number of rights or powers reserved to them even expressly, XZ and Y, far outnumber those given to Nation or State in A and B and AB. The cardinal principle of all, that they are sovereign still, and have only clothed the "general government" with part of their powers, is expressed in the preamble—"We, the People"—not the States, as the secession party held—established the Constitution; and still more precisely, as our ancestors, adopting the Constitution "with reservations" demanded, in the Ninth and Tenth Amendments, "The enumeration of rights shall not disparage others retained by the people"; "the powers not delegated . . . are reserved . . . to the people." Remember, there would have been no Union but for these amendments; no Nation, but for this sacred promise to the people that their liberties should be preserved.

This centre space Y, therefore, with the related seg-

ment XZ, perfectly relates those powers which remain with the people, which have been expressly denied to either government, State or Federal. It is the largest area of all. It occupies more clauses of the Constitution than either State or National power (see diagram); to give it visual significance and for quick reference this is printed after the last chapter, as it forms the substance of this book. This part of our circle still remains white; a virgin domain with the people; when it is invaded, by Executive, Administrative, or Congress, our liberty is lost.

NOTE to CHAPTER.—(Centralization) “involved more dangers to the liberties of America than the claims of the British Parliament to tax us without our consent . . . the destruction of the people’s power, the downfall of liberty and the subversion of the rights of the people; for whenever all the important powers of government shall be centred in that of the United States, it will be without check or control.” (Virginia newspaper of 1792, quoted in I Warren, 97.)

“A centripetal, as well as a centrifugal principle, exists in the Government; and no calamity would be more deplored by the American people than a vortex in the General Government which should engulf and sweep away every vestige of the State Constitutions.” (Judge Roane in Va. Court of Appeals, 4 Mumford, 3.)

“The House of Representatives sent us yesterday a bill for incorporating a company to work Roosevelt’s copper mines in New Jersey. I do not know whether . . . we have concurrent legislation [with the State] under the sweeping clause, Congress is authorized to defend the nation. Ships are necessary for defense. Copper is necessary for ships. Mines are necessary for copper. A company necessary to work the mines; and who can doubt this reasoning who has ever played at ‘This is the house that Jack built’? Under such a process of filiation of necessities the sweeping clause makes clean work.” (Thos. Jefferson, vol. IX, letter of April 30, 1800.)

Thomas Addis Emmett in 1824 “viewed the progress of the Union towards consolidation with a fearful solicitude. . . . State Rights are State liberty. They are more; they are in this land the bulwarks of individual and personal liberty . . . while they are preserved entire, our Federative Union will stand against the shocks of time and the approaches of despotism. But let them be broken down . . . and

a consolidated power must succeed in governing this mighty Empire. Consolidation will be the death of our Constitution." (II Warren, 78.)

"Consolidation with all its terrors . . . a death blow aimed at the very existence of the State." (The *Richmond Enquirer*, May, 1821, quoted in II Warren, 16.) "Our Government is now taking so steady a course as to show by what road it will pass to destruction, to wit, by consolidation first, and then corruption, its necessary consequence." (*Ibid.*, Jefferson, June 25, 1821.)

"By this time [1833] the Supreme Court was firmly entrenched in popular favor as the defender of the liberties of the people and of home rule in the States while firmly insisting on the supremacy of the Federal Government in national matters." The only question was (and is) which *are* national matters? And the answer to this question has been enormously widened by three things: first, the Fourteenth Amendment, which made all cases where the constitutional right to law (as I have termed it: due process of law is too narrow a phrase) was invoked by the losing party reviewable in the Federal courts. Second, the Civil War, and the necessities growing out of it, until checked in cases like *Milligan's* and the Civil Rights decisions, but still further widened in the Great War. Third, the necessities of interstate commerce and the fact that most business is now conducted by corporations and much action controlled by labor-unions or employers' associations, which, even when they do not take out corporate charters, are challengeable under the Antitrust Acts.

The Civil Rights cases (1876) showed "the determination of the Court to maintain the true character of the Government, and to hold, notwithstanding the excited feelings growing out of the war, that the existence of the States, with powers for local and domestic government, including the regulation of civil rights, the rights of persons and property, was essential to the perfect working of our complex form of government." (Carleton Hunt, quoted in III Warren, 330.) "In *U. S. v. Harris*, 106 U. S., 629 (1883), the Court determined that the war amendments did not authorize Congress to legislate directly as to the acts of private persons, but only gave a national guaranty against adverse State action; it could not step into the domain of local jurisprudence and lay down rules for the conduct of individuals in society." (Warren, *ibid.*, 335.)

The clause in the Constitution requiring that citizens of every State shall be entitled to all the privileges and immunities of citizens of any other State (IV, 2 (1)) is intended to prevent overt discrimination by States against citizens of other States in respect to the fundamental privileges of citizenship, but neither it nor the Fourteenth Amendment transfers to the Federal Government the protection of civil rights inherent in State citizenship; it only secures those which owe their existence to the Federal Constitution, laws, or government. (*Maxwell v. Bugbee*, 250 U. S., 537.)

CHAPTER X

THE EXTENSION OF FEDERAL POWER UNDER THE INTERSTATE COMMERCE AND TAXATION CLAUSES AND THE FOURTEENTH AMENDMENT

Constitutions, even written, may be changed by interpretation as well as by amendment; and until recently the former has been the only path we have taken to change our own. For the first ten amendments, forming the bill of rights of individuals against the central government, were proposed by the first Congress September 25, 1789, as part of the very compact under which the Constitution, signed by Washington, September 17, 1787, was ratified by the States, and may therefore be considered as if coeval with it; and the Constitution itself had only gone into effect on the March 4 previous. And the Eleventh Amendment was but a renewed assertion of State sovereignty passed to meet an unexpected decision of the Supreme Court that States might, in the Supreme Court, be sued; while the Twelfth was merely formal, concerning the manner of electing Presidents. So we may say that the Constitution went in substance unamended down to the war of secession. But that brought about three substantial amendments, ratified in 1865, 1868, and 1870, respectively. Yet except as they did away with

slavery, and extended National protection over the cardinal rights, these were political in effect, extending Federal powers but not touching matters of substantive law. Then, in 1913, another tremendous extension was given to the National power in giving it a right of direct taxation, hitherto the prerogative of the States alone. The Seventeenth Amendment (direct election of Senators) was again merely political, as was the Nineteenth (women suffrage). So that the Eighteenth, against intoxicating liquors, is still of all our amendments the only one which invades the domain of substantive law not to protect but to inhibit private action. (For the Thirteenth, doing away with slavery, but reasserted a natural right.) As such, therefore, it is anomalous, however worthy its object. For all the doctrines of the unwritten English Constitution, as well as the provisions of our own up to 1919, were restrictions upon various supposed or usurped powers of the King or Executive, or the Federal Congress or (under the Fourteenth), State legislatures, written in the interest of the individual, aimed at official action of crown or army or court or American executive or legislature against the individual, not aimed against the individual himself. Whether wise or unwise, the principle of putting such things into a Constitution is therefore both novel and portentous.

But before coming to a discussion of such substantive change by express amendment, let us consider further those changes which the Constitution has taken through evolution or interpretation. One great matter must be

mentioned though it be political and therefore not within our subject: the exercise of sovereign political power by the Federal Government outside the North American continent and unrestrained by the Constitution. This all rests upon the evolution and interpretation of Article IV, 3 (2): "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." It is probable that our ancestors did not contemplate any such extension, and that they certainly intended the Constitution to apply to anybody living within the limits of the United States, still more that Congress as well as our Executive and our courts should always consider themselves bound to act according to its principles. Yet under imperial necessity we have considered a vast territory as a limbo outside its pale, its principles not even mandatory except so far and in such doses as Congress chooses to apply them.* Yet it may even now be questioned whether public sentiment would tolerate the doctrine of the "Insular cases"† should we, for example, annex part of Canada. Still, the court has held that only one fragment of the Constitution necessarily follows the flag, the provision of the Thirteenth Amendment against slavery. For that one says so!

This is the great external modification. Internally, the great change has been caused by the four words giving power to "regulate Commerce . . . among . . . States."

* *Public Utility Commissioners v. Ynchausti*, 251 U. S., 401.

† See in 182 and 183 U. S.

Yet these words were originally put in the Constitution, not with the notion of inviting the central government to interfere with, certainly not to prohibit, interstate commerce, but with the purpose of preventing the States from doing so. The history of Revolutionary times shows this. But from the first extension of this clause to cover the instrumentalities of commerce, steamers and their routes and railroads, we have gone on to at least try to include properties or labor whose output may become the subject of such commerce. Had not the Supreme Court definitely checked this tendency in the Child-Labor Case we should have seen Congress controlling not only all manufactures or mining industry, but the human beings employed in them, and the corporations now under State charters. And this would alter our Constitution of government more radically than any single amendment could do. The Federal Government would cease to be mainly political; it would thrust its hand between every man and his neighbor, between every man and his own property. The old idea that a man's life and his liberty and his property rights lay under his home government, protected by laws and juries of his neighbors, people of the same community, considering its especial welfare and conditions, tried by local courts, would vanish forever. The States would lose control of most of their business affairs, lose the power to tax their own enterprises and regulate their own corporations, see their governments shorn of dignity and their courts of most of their jurisdiction; hardly any business would

be so small, so local, as to be left to the State's power to control. Local self-government would be a memory, local conditions would cease to be considered; and in all things, in our havings and our doings, in our getting up and lying down, we should have to be under one uniform, Procrustean rule, dictated in haste, with such wisdom as the Lord might vouchsafe, by a tired assembly of Congressmen at Washington.

Now in the very next section we find the provision that no tax or duty shall be laid on articles exported from any State, and also that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another. It is pretty clear, therefore, even if the history of postrevolutionary times did not show it, that the intention of the Constitution was to make trade between the States absolutely free, to give to neither State nor Nation power to prohibit it in any way. Yet there have been repeated attempts by Congress to prohibit it entirely in certain commodities, as, for instance, alcoholic liquors,* which was sustained by the Supreme Court; and goods made by convict labor, so far enacted only as to foreign commerce; and goods manufactured in whole or in part with the labor of children of an age lower than that prescribed by the Act of Congress,† which last law was

* U. S. v. Hill, 248 U. S., 420.

† In *Hammer v. Dagenhart*, 247 U. S., 251, "An Act of Congress is not a regulation of commerce unless it appears fairly to be so upon construing the whole scope of the law and not a regulation of some other subject which Congress is not empowered to regulate," O'Brien *arg.* And the court, by Mr. Justice Day, "the grant of power to Congress over the subject of interstate commerce was to enable it to

held unauthorized by the clause in the Constitution, on the ground that it was meant to give power to Congress to make rules for the conduct of interstate com-

regulate such commerce, and not to give it authority to control the States in the exercise of the police power over local trade and manufactures. . . . Over a purely Federal matter, was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment. . . . The maintenance of the authority of the States over matter purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters entrusted to the Nation by the Federal Constitution. . . . It must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. The power of the States to regulate their purely internal affairs by such laws as seem wise to the internal authority is inherent and has never been surrendered to the general government. . . . To sustain this statute would not be . . . a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the Federal power of the control of a matter purely local in its character and over which no authority has been delegated to Congress in conferring power to regulate commerce among the States. . . . If it could (so regulate) all freedom of commerce would be at an end, and the powers of the States over local matters eliminated, and thus our system of government be practically destroyed." But four justices dissented—Holmes, McKenna, Brandeis, and Clarke.

Congress then attempted to arrive at the same result through the taxation power; and again the court declared the Act of Congress beyond their powers, and this time with only one dissent, Clarke. The attempted law was to impose a 10 per cent tax on the product of minors under sixteen in mines or fourteen in manufacturing establishments; and the Chief Justice, in the opinion, said: "It is an attempt to make regulations, in accordance with the congressional wishes, and applicable to the whole country, in a matter so influenced by local circumstances as to be properly regulated only by local legislatures"; and Mr. Bynum, in the prevailing argument, had said: "The power of Congress is to lay and collect taxes, etc., and there is no expressly given power to provide, under color of a tax law, for the general welfare of the United States." And the court, citing *Hammer v. Dagenhart* above, decided that an Act of Congress, clearly designed to control conduct the regulation of which is reserved by the Constitution exclusively to the States, cannot be sustained under the Federal taxing power by calling the penalty a tax. (Child-Labor Tax Case, reported in 259 U. S.)

merce, but not to control domestic conditions or industrial life.* Yet the right does include the right to control, not only all the instrumentalities, but the goods themselves while in transit or when marked for such transit, the documentary or contractual matters, such as bills of lading and insurance, the persons who conduct such commerce, as to conditions, hours, and charges at least, the profits or charges to be made by them; and this last leads, of course, to the general regulation of

* In the "White Slave" Case, *Caminetti v. U. S.*, 242 U. S., 470, the interstate commerce power was extended to punishment of personal misconduct, but in the *United Workers v. Coronado Co.*, 259 U. S., it was held that the power could not be extended to prevent, try, or punish crime or murder committed or threatened through a union of coal-miners; and the U. S. Attorney-General's opinion was to the same effect in the *Herrin Case*. The most recent decisions of all are the *Pennsylvania Coal-Tax Case* (decided November 27, 1922), *Heisler v. Thomas Colliery Co.*, where a tax on all anthracite mined in the State was held not an unconstitutional interference with interstate commerce nor export tax; and the *Minnesota Iron-Ore Tax Case*, where the tax was of 6 per cent on the value of the ore imposed as an "occupation" tax on the persons or corporations producing it (*Oliver Iron Mining Co. v. Lord*, May 7, 1923), and *Hallaman v. Eureka Pipe Line Co.*, where a decision was rendered to the same effect as to a 2-cent tax per barrel of oil. So, in *Texas Baseball Club v. National League* (259 U. S.), the business of professional baseball, in all its combinations, was held not to amount to interstate commerce, despite the incident travel, etc. But in the very latest case (*Pa. v. W. Va.*, June 11, 1923; see below, in the text) the States of Pennsylvania and Ohio brought suit against the State of West Virginia to directly test a statute of the latter State designed to control the distribution of natural gas in the interest of its own citizens; and the law was held to be unconstitutional as interfering with interstate commerce.

Only a few years before, in the *Danbury Hatters' Case* (*Lawlor v. Loewe*, 235 U. S., 522), the court had held that a conspiracy to control the manufacture of hats at Danbury, which were in fact mostly sold outside the State of Connecticut, was a matter of interstate commerce; which shows how fine a line has to be drawn—but the layman should not take this as showing any inconsistency in the court; the boundary line between what is and what is *not*, in all constitutional matters must necessarily be thin. So another recent decision on the other side, *Lemke*

all corporations who conduct such business, and most of it is so conducted. As the bulk of our commerce is interstate or with other nations (comparatively few products are made, moved to market, and finally consumed within the lines of one State), a broad construction of this power would put control of all people's commercial affairs in the hands of Congress, take away their own control of their property and the protection of their local laws, remove most of their business corporations, deprive the States of their "police" power (this rather unfortunate, because too narrow, term

v. Farmers' Grain Co., 258 U. S., 50, held as an interference with interstate commerce a North Dakota law which attempted to require licenses from the State for all persons engaged in interstate commerce in wheat, and to compel them to maintain elevators and to act generally under State regulation even as to prices and profits, the court saying, through Mr. Justice Day: "A State cannot lay burdens on interstate commerce in the guise of police regulations to protect the welfare of her people." And compare the first Grain Future Case, p. 130.

That the interstate commerce power of Congress may, however, be submitted by it in part or concurrently to be controlled by a State's legislation, see *Clark Distilling Co. v. West Maryland R.R. Co.*, 242 U. S., 327.

The principle that manufactures are not commerce and that manufactured goods though wholly designed for export are not the subjects of interstate or foreign commerce until shipped was early decided and has just been strongly reaffirmed. (*Crescent Cotton Oil Co. v. Mississippi*, Nov. 19, 1921.)

But State laws cannot exclude a person from conducting interstate commerce within its boundaries or require special license or regulations therefor, and this applies to ordinary corporations, who in this enjoy the constitutional protection given natural citizens. (*Dahne Walker Milling Co. v. Bondurant*, Dec. 12, 1921.) Yet a State may withhold its comity, *i. e.*, absolutely exclude any corporation from doing business within its limits under general law, as in the *Crescent Co. Case* immediately before, where the law of Mississippi was sustained which so excluded a corporation interested in the manufacture of cottonseed oil or meal from owning or operating any cotton-gin in that State. "Equal protection of the law does not compel a State to admit corporations, when they have no Federal right, to doing business within them."

really includes all a State's legislative, administrative, or judicial power over its own citizens, land, property, or affairs, not by any means to be limited to criminal matters or municipal police regulations, as the layman might suppose) and their courts of their jurisdiction, remove from them their main source of taxation, and reduce the States, save for some criminal jurisdiction, to almost the political unimportance of a French department.

The tendency to this extreme has been checked by two or three judicial decisions, marking, for the present at least, the high tide of this flood of centralizing measures—just as we found, in personal-liberty matters, as to the labor contract. The State power of excise taxation on an interstate commerce corporation for the privilege of doing business in the State has been vindicated, as well as the right to local taxation on the corporation's property there situated. A Federal statute making it a misdemeanor for an employer engaged as a carrier in interstate commerce or any of its agents to discriminate against members of labor-unions by discharging or threatening to discharge them because of membership in such unions was held unconstitutional, as not within the interstate power of Congress, being an invasion of personal liberty as well as the right of property guaranteed by the Fifth Amendment. It is not within the functions of the general government to compel any person in the course of his business and against his will either to employ or to be employed by another; an employer has the same right to prescribe

terms on which he will employ one to labor as an employee has to prescribe those on which he will sell his labor, and the rules regulating interstate commerce must have an organic relation to the commerce regulated.* And in the Child-Labor Case where the same result was aimed at both through the interstate commerce and the taxing power, and Acts of Congress were held unconstitutional (see above), as we have seen, though in the first case by an evenly divided court.†

In the same way the Fourteenth Amendment, which might have proved to be the greatest of centralizing measures, was promptly checked by the decisions of the court in the Civil Rights cases, though extended in the Slaughterhouse Case far beyond the intention of its proposers, which was doubtless only to protect the negro. But in protecting him they protected everybody else, and enacted as it were a new National Bill of Rights in the interest of the individual against State governments. It has not therefore resulted in centralization, except for the wholly desirable result of unifying the judgment of State with National courts in matters affecting the cardinal rights. It took no powers from the States, and only reinforced, by a Federal sanction, the elemental liberties of the people; making a double safety-lock upon them, as it were (for they were already expressed in all the State Constitutions), as they had elsewhere done in the case of bills of at-

* *Adair v. U. S.*, 208 U. S., 161.

† See pp. 197, 198.

tainer, putting them into our division XZ instead of X simple. And every attempt made by Congress under the Fourteenth Amendment to make laws applying directly to the people of the States, to assume new powers of centralization not expressed in the original Constitution, was sooner or later declared impossible by the Supreme Court. And this may yet be the case if there be under the interstate-commerce clause attempted National control over corporations and industries generally.

The opposite tendency, that of the States to control, or tax, indirectly, matters of interstate commerce, has only recently appeared serious; but some might regard it as the greater danger of the future. With the immense development of discoveries like natural gas and hydroelectric power, the increasing industrial interdependence of the States, and the monopolies possessed by some of these in primal necessities such as anthracite coal, petroleum, or natural gas, iron or other minerals, the question has already presented itself whether a State may control, monopolize, or even tax such natural resources for the benefit of its own citizens and to the burden of citizens of other States, and, indirectly, of interstate commerce. Its right to tax coal, iron ore, or the industry producing them has lately (see p. 199, note) been sustained; these decisions will suggest to other States to get the benefit of such taxation upon their natural resources or products which are, for the most part, consumed in other States, even on natural water-power when the electricity it generates serves

public utilities across State lines. But as we write, the tendency to such selfish State control of natural products has received a severe check; a West Virginia statute "intended to compel the retention within the State of whatever natural gas may be required to meet the local needs for all purposes," and which "directly and immediately would work a large curtailment of the volume of gas moving into the complainant States," was declared unconstitutional as an interference with interstate commerce.*

The situation as to the evils of the "trusts" was fully discussed in the earlier volume. Their evils were undoubtedly accentuated by the principles of State sovereignty, and the doctrines of interstate comity, which made it necessary for every State to open its markets and its courts to any "trust" incorporated in any other State however lax or harmful the provisions of its charter. President Roosevelt seemed to conclude that Federal incorporation was the only adequate remedy; the McKinley Industrial Commission recommended a system of Federal license for interstate business with supervision by the Bureau of Corporations (now the Federal Trade Commission) as the safer remedy; the other would take from the States

* *Pennsylvania v. West Virginia*, *Ohio v. West Virginia*, both decided June 11, 1923. Holmes, McReynolds, and Brandeis dissenting, principally on the ground that the gas so controlled had not yet passed into interstate commerce, and that so the decision was inconsistent with the Minnesota iron-ore tax case above cited, where the tax was sustained, "although substantially all the ore left the State and was put upon cars for that purpose by the same movement by which it was severed from its bed."

the power which they now have to exclude or control such corporations. And it would prove to be a centralizing measure of the most far-reaching extent. If the words "interstate commerce" are stretched to permit the Federal incorporation of all business corporations, the States and the people thereof will as such become powerless. They will lose the protection of their own laws. One of the first effects of the Federal law regulating railway rates was to deprive shippers of all their common-law rights as to extortionate charges and their own States of power to fix or control them by their own laws.* In vain they invoked the Eleventh Amendment; injunctions were sustained against State officers from proceeding with such suits and enforcing State laws. The result was, the individual was relegated to one tribunal instead of two, lost the protection of his local laws and courts, and fell into the hands of a Federal commission. Railroads are instrumentalities of interstate commerce unquestionably, so the Federal law has prevailed, as to them; but imagine the vast change if the same principle applied to all kinds of business as well.

Such Federal powers, moreover, vast and indefinite, must always in practice be administered by some one officer; had there been a Federal incorporation law it would have been by the Commissioner of Corporations; it is now a commission. In my earlier work I ventured to compare this executive official to the early

* *Ex. p. Young*, 209 U. S., 223; *Greene v. Louisville R. R. Co.*, 244 U. S., 499.

commissioners of the Norman kings, created for the same sort of purpose, clothed with arbitrary visitatorial, inquisitorial, dictatory powers.* That is to say, he is empowered to single out any one corporation for attack, not required to extend the same method or examination to all, as a bank commissioner does; he may launch proceedings against any as arbitrarily as an excommunication of the Pope. Visitatorial powers are always objectionable, though permissible in the case of corporations, which are the artificial creatures of the State; and have no natural rights. And such Commissioner of Corporations may at any time descend upon any corporation, examine into all its affairs, insist on seeing all its accounts, books, or private correspondence. Under general constitutional principles this could not be done with the individual citizen, though we are now used to such proceedings in the case of the income tax; generally you cannot have indefinite search-warrants, as we have seen, nor compel criminating evidence—these rights are, however, personal, do not apply to corporations, and the Federal Government has the same powers over State corporations, in so far as they do interstate commerce, as it has over its own. Yet a corporation has been decided to retain under the Constitution the *property* rights of the individual; and the arbitrary power to descend upon such corporation as he selects resembles too much the thing prohibited in Magna Carta itself—"nor will we go upon him nor send upon him unless by the law-

* *The American Constitution*, ed. 1914, p. 247.

ful judgment of his peers, or by the law of the land," *i. e.*, a law applying equally to all. The mere selection of a "trust" for such investigation might work injury to its business, though innocent. If a bank examiner did not visit *all* banks, his presence at any one might cause a run upon it. Yet this law, since these words were first written, does not seem to have been abused, the original Commissioner having been replaced by a non-partisan commission. Still, should we ever have an unscrupulous Attorney-General or chief Executive, it would place in his hands a tremendous engine for subverting the principle of equal laws, among corporations, controlling business, or corrupting elections. The Executive should not have arbitrary power to descend upon even the trusts; and to select which one he shall attack, which one he shall leave immune. And this remains a danger in the Sherman Act; while, as we have shown, it takes away the remedy from the individual (see above, pp. 69, 70).

Remains the most centralizing tendency of all and the most dangerous—that of taxation under the general-welfare phrase for National purposes or functions hitherto unconstitutional. We repeat that there is no such thing as a "general-welfare" clause as the phrase is commonly understood; that in the Preamble expressly gives the general government no authority except as by the Constitution itself; "what authority he hath, he hath but by law," as the speaker, Wentworth, dared to say to Elizabeth; while that in the article specifying the powers of Congress merely limits the powers

of taxation. But under this theory appropriations are to be made for any purpose desired by the most radical, and National boards, or even departments, are to be created to expend them, and hence, to perform functions hitherto left to the States. Thus the government not only creates the tax, but the tax creates the government! The bait for this revolutionary change, as has been said before, is the half of the tax given by the nation, which the States do not think they pay. To such proposals there can be no end—and no check, save that interposed by the Supreme Court under the Constitution as it stands.*

Realizing this, the malcontents, in this as in other matters, contemplate amending the substance and altering the nature of the Constitution itself. Their first attack, however, will be made upon the judiciary; for if that can be stricken down, the other changes can be

* It is extremely difficult to get such matters before the court, as they rarely present a situation where the interests of any one individual are so definitely damaged that he can bring suit. And as has been said, the Supreme Court has no direct power to declare a law unconstitutional; it is only where there is actual litigation and it has to choose between the alleged law and a constitutional provision; though there was very nearly a direct intervention to annul a law abstractly in the *West Virginia Natural Gas Case* (p. 199, above), but even this possibility does not exist in the case of a Federal law. Even a sovereign State cannot sue, under the original jurisdiction of the Supreme Court, in the interest of its taxpayers. Both Massachusetts and a private citizen brought suit, the latter in the District of Columbia, to contest the constitutionality of the Sheppard-Towner Maternity Act of Congress. Unanimously the court held that there was no judicial question. "The citizens of Massachusetts are also citizens of the United States," and "it cannot be conceded that a State may issue judicial proceedings to protect citizens of the United States from the operation of the statutes thereof." And Mr. Justice Sutherland rendered the opinion "that the cases must be disposed of for want of jurisdiction without considering

made unchallenged. Now the Declaration of Independence itself makes a chief complaint against King George's government that he "has made judges dependent on his will alone for the tenure of their offices," and it was the English Revolution which brought about the Act of Settlement which declared that all judges should hold their offices during good behavior, removable only by Parliament, and have neither their salaries nor the places dependent upon the executive; and we added, in our Constitution, the principle that Congress itself could not remove a judge; he could only, like any other official, be impeached for misbehavior. But many bills have been introduced in Congress to make our judges removable by the President, and many to have them elected by popular vote and for short terms, as is the case in the newer States.

the merits of the constitutional questions," and went on to say, in the individual case, that "the right of a taxpayer to enjoin the execution of a Federal appropriation act, on the ground that it was invalid and would result in taxation for illegal purposes, had never before been passed upon," and . . . denied it. (June 4, 1923.)

Yet the plaintiff, Mrs. Frothingham, had appealed to the courts of the Federal Government as *parens patriæ*, which words used in the other opinion were given as a reason why the State could not act as such parent in Federal matters. The grand result is, therefore, that the Supreme Court will refuse to take jurisdiction to consider such "fifty-fifty" laws—except, of course, in such special cases as may involve a National bond issue which may be attacked by an ordinary suit where one party sets up its unconstitutionality, or a case like a tariff including a sugar bounty, where a private litigant can show a direct injury and attack the whole law by refraining from paying his own duties thereunder. But Massachusetts has a law, sustained under its Constitution, where such a law or appropriation can be attacked, on constitutional grounds, by any ten taxpayers. It is to be regretted that we have not a similar remedy in our Federal Government.

CHAPTER XI

OF CONSTITUTIONAL AMENDMENTS IN THE FUTURE

We have tried to show that a constitution, first invented by our own race (in the modern sense of securing free government and protecting the people), is essentially a body of prohibitions—restrictions on the government, not upon the people—defining what may be done by the executive or lawmaking power, but by no means insisting on what shall be. It is essentially restrictive, never constructive; that is left to the people to act freely, through their legislatures, for their own ends. And wisely so, especially in ours; for a written constitution is rigid; if it contains error, it may not be cured. That is why our ancestors were careful to put nothing that is even debatable within the body of our Constitution. It concerned the frame and scope of government, the guarantees of the individual, not his conduct of life. Its matter was nowhere what I have called *substantive*. Therefore the people were left indefinite freedom for modification by law or by evolution of custom, as their *kultur* (the German word here is more expressive than *civilization*) required. It never occurred to our ancestors that this very written Constitution could be used like a mould

into which to pour the hot thought of the moment and leave it as cast iron. Yet this is the recent political discovery; and there is no constitutional answer to it.

Not only that, but it is far easier to get laws into the "perennial bronze" of our fundamental law than to pass them as statutes in all the forty-eight States. This requires no explanation. The official Commissions on Uniformity of Law, working now since over thirty years, have hardly ever succeeded in getting a statute even of the most obvious simplicity and necessity adopted in actually *all* the States. And even then it is only in each State an ordinary statute, repealable at will. But it is not a difficult matter with organized propaganda to get a National constitutional amendment voted by a timorous majority of each State legislature in thirty-six selected States, particularly if any moral tone can be placed upon it; and it becomes then the National fundamental law, forever, in practice, irrepealable.

The suggestion, the precedent, of thus including substantive matters in the permanent fundamental law was given by the faulty construction of our modern State Constitutions. The jealousy, or the distrust, of our legislatures which I adverted to in my first chapter increased, rather than diminished, as time went on. The later State Constitutions, especially those of new States, increase very much the number of restrictions, inhibitions, or even mandatory instructions upon their legislatures, so that there is not to-day in the Union

any State whose legislature has so much power as that of Massachusetts (still called, by the way, as is the English Parliament, a "great and general *court*"),* while in the newer States their wings are so much clipped as almost to take away the character of representative government.

To say nothing of the general disrespect for law, of the uncertainty and confusion attending such continual constitutional amendment (the State of California had sixty-nine constitutional amendments in one year; and its Constitution reads like a treatise, and is seventy-four pages long, octavo, fine print, of which forty-seven are given to substantive matters, only proper for legislation; the Constitution of the United States, printed beside it, occupies eleven pages only!), there is the danger of making irremediable mistakes, and the general infringement of the people's liberty, and, finally, the fundamental objection from which all others spring—that such a practice is utterly illogical, opposed to the whole theory of our Constitution, and to its history as an evolutionary growth.† The attempt to padlock

* It has power to enact "all manner of wholesome and reasonable orders, laws, statutes, ordinances, and directions as *they* may judge for the benefit and welfare of the State," and there are no restrictions, even to the passing of special laws or local laws or requiring laws to be uniform. But there were in 1908 one hundred and twenty matters upon which such laws were forbidden by the Constitutions of other States; and on many subjects they are forbidden to legislate by general law, or affirmatively required to legislate in a prescribed way. See note 9 on page 293 of the author's *Federal and State Constitutions*, and the following sixty pages of that work are mainly filled with such substantive provisions of the various State Constitutions.

† The Oklahoma Constitution has a Bill of Rights containing thirty-three sections, more than one hundred limitations upon legislation,

people against themselves, to bridle posterity, is silly and foredoomed to failure—else were it dangerous, breeding disrespect for law or revolution against our frame of government.

The tendency of the time is the blind rush to cure an immediate evil, oblivious of all else, reckless of method or consequences. Because certain sections of the country were aggrieved by excessive freight rates, we hurried to put our transportation interests in the hands of a centralized power at Washington; because we want better education, we are now asked to place all educational affairs under a Washington bureau; so, for better children, the supervision of maternity hygiene, for better morals, our marriage and divorce laws. To such a process there can be no end short of the destruction of local self-government and the establishment of a bureaucracy in Washington as autocratic and far-reaching as was that of the Tchinovniks in Russia before the Soviet revolution—and to that end we might come. The only check is our Supreme Court, reinforcing, and reinforced by, an enlightened public opinion.

This notion of making of a constitution an instrument to bind and not to loose originated in the ample experience of our people in the newly formed States in the West in constructing, with some hurry, ready-made constitutions. They forgot that a written constitu-

contained in two pages of fine print, and elaborate chapters upon corporations, homestead, education, banks, roads, internal improvements, insurance, manufacture and commerce, aliens, and two pages of "miscellaneous" restrictions.

tion, being an iron-bound document to which the people as well as all future lawmaking must conform, should properly contain nothing but the frame of government and the Bill of Rights, as, up to the adoption of the Eighteenth Amendment, was the case with our National Constitution. It should describe the form of government and control it, but leave the people free through their own parliaments to work out their own future. It should set bounds to the power of government and impose upon it the restrictions necessary for the people's liberties, but never impose shackles upon the people themselves.

It is regrettable that such an argument may meet with the disapproval of that vast majority of our people who are now in favor of the prohibition amendment. But our objection to it is constitutional, not doctrinal. Slavery being the denial of a cardinal human right, its prohibition may with logic be included in the Bill of Rights of a written constitution; yet it is probably the precedent of the kaleidoscopic Kansas Constitutions, adopted in rapid succession before the war to free the slaves, first to make slavery permanent, then to abolish it within that State, that suggested the practice of attempting to padlock within a constitution matters which are properly the subject of ordinary legislation. But this custom grew apace. All the Western States and a few of the Southern have now incorporated such like provisions in an ever-increasing number, so that the Constitution of Oklahoma, or even Alabama, has become an unwieldy, almost encyclopædic, document,

attempting to perpetuate the entire mass of the preferences or the prejudices of the convention's majority at that particular moment of history. (It is noteworthy in this connection that the people to whom the conventions have to refer such constitutions are more than likely to reject them; this has recently happened both in New York and in Massachusetts. Indeed, the referendum, hailed as a highly radical change, is far more likely to prove to be a conservative one, acting as a check on ill-conceived or hysterical legislation. And, though it tends to do away with representative government, the Supreme Court has held that to be a political question, and refused to adjudge it a government not republican in form.)

We must repeat: the substantive *corpus juris* has no place in written constitutions; and the sooner our people learn to abandon the practice of placing it there, the more likely it is that our system of constitutional government shall endure. The whole value of the great American idea of having a Constitution which shall forever control both the executive and the legislative branch of government in the interest of the people and for the perpetuation of what our history has taught us to be the necessary human rights under a free government, is cast aside and made ridiculous. No passing generation can thus shackle posterity. Such a constitution, instead of a shield for the people's liberties, forms, as I said at the beginning, but a trap to catch them in. It were better at once to return to the English system of constitutional govern-

ment and forego the attempt to protect the people against Congress. For this is the danger: that thoughtless bodies of impatient reformers, having learned how easy it is and how instantly effective throughout the Nation, may abandon the attempt to make State laws, and endeavor, through permanent lobbies and a propaganda of threats instead of persuasion, to impose each present hobby on our tablet of permanent law, regardless of the Bill of Rights of the Federal Constitution and its careful provisions for the autonomy of the States. Such an event to their labors would make the framers turn in their graves. Never for one moment did the idea occur to them that the Fifth Article of the Constitution, providing for its future amendment, might open the door to the destruction of all its principles by changes sacrificing those elemental rights which they all believed no government might take away and which they had fought the Revolution to secure; by amendments *qualitative* or what I have termed substantive in nature, controlling or overriding those very rights which it was framed to protect, and losing sight of their own vision that this Constitution was being made to protect the people, from their government even, as to these essential human liberties, never to further bind them, albeit it had a majority behind it.

Yet the Constitution cannot rise above the Constitution; and all in it is, by its own terms, subject to amendment save the provisions protecting slave importation and forbidding direct Federal taxation* be-

* A Washington lawyer has recently challenged the "constitutionality" of the Sixteenth (income tax) Amendment under this clause, though not adopted until 1913, relying on a dictum of Mr. Justice Wayne

fore 1808, and always the equal representation of States in the Senate.

Yet, on the 16th of January of this very year (1923), on the hearings before the Senate Judiciary Committee upon a constitutional amendment proposed to meet in part this evil practice, it was stated that no less than twenty Senate joint resolutions to amend the Constitution and fifty of the House were then pending before Congress! And these were all introduced during the lifetime of the 67th Congress—only twenty-two months up to that time.

Senator Wadsworth's resolution only went to the extent of providing that, when a State so desired, a national constitutional amendment should be voted on by the people of such State and not by the legislature alone, and that no State legislature should be permitted to vote on an amendment which had been elected before the passage of the amendment through Congress. It would be more logical to say, as the Constitution itself starts off by saying, that it is made by "We, the People of the United States," that all amendments to the Constitution should therefore be voted by the people in the States and not their legislatures. But our ancestors thought that these would be, if not more courageous, at least more intelligent, in their vote on such than would be "the common masses." They

in *Dodge v. Woolsey* (18 Howard, 331). But, though these provisions (against direct taxation and for two senators for every State) were undoubtedly arrived at as a compromise, the obligation not to repeal the one without the other is only moral. (Mr. Walter Holland, in W. E. Brigham's letter to the Boston *Evening Transcript*, July 18, 1923.)

were wrong. "The masses" use their own intelligence, and their ear is not to the ground; they are not moral cowards.

Senator Wadsworth's proposed amendment (since indorsed by the American Bar Association, August, 1923) was smothered in the closing session of the 67th Congress, with many a worse bill; it was well conceived, so far as it went. But the primal reform must be in the public intelligence.

Of all constitutional amendments, pending or impending, the most immediately dangerous is that to destroy the function of the Supreme Court to apply the Constitution, and thus make of it, as against the legislative branch, a mere dead letter, "a scrap of paper," at most only for Congressmen to consider if and when they chose; and (more impossible if more logical) the recall of judicial decisions by popular vote. Of this, not much has been heard lately; the public appears to have been convinced of its absurdity.* The earliest amendment, advocated in 1821, to make the Senate the Court of Appeal, had at least the English precedent.†

Every voter, male or female, must be brought thoroughly to understand the origin and the necessity of that American doctrine that there must be some impartial branch of government to protect us all when

* Not to take more space here, the author will venture to refer to his study of it in "Certain Retrogressive Policies of the Progressive Party," *Proceedings Am. Pol. Sci. Assn.*, 1912.

† II Warren, 116.

either President or Congress usurp their functions or disregard elemental human right as defined by our Magna Carta. And the proposed amendment requiring unanimous vote of the justices of the Supreme Court to hold a law unconstitutional is likewise objectionable, not only as an "entering wedge" but as silly in principle and unnecessary. In the first place, as has been shown, the court never decides constitutional questions without a full bench, which means that at least five justices must concur to declare any law unconstitutional; and in the second place, no constitutional question is ever "settled" by a Supreme Court opinion; it may in any similar case be reopened, as public opinion makes itself felt, as other judges are appointed. We have been shown how rare are the cases where an important Act of Congress, or of a State legislature, has been set aside as inconsistent with the Constitution, and how universal has been the public approval of such decisions—certainly the public approval of *history* has come in almost if not quite all such cases. The one case where there was a definite disapproval led immediately to the passage of the Eleventh Amendment; and this is the course always to be followed. Even majority—five-to-four—opinions have their great value and use. The very disagreement calls popular attention, shows the matter is important and to be considered, informs legislatures, arouses public opinion; while the frank expression of the minority opinions encourages the losing side and

emboldens future courts to a reversal; in three or four great instances this has happened. Nothing is more unsatisfactory than a blank decision of a great constitutional question without expressing the reasons or giving voice to the dissent; this was very generally felt in the court's decision on the Eighteenth Amendment. And if a great constitutional principle, a cardinal human liberty, is really infringed by any Act of Congress or State legislature, is it not more absurd to give one justice the power of preventing the court from saying so, than to let the majority opinion (and it is mightily important to all of us that it should prevail if correct) prevail, for the time being, subject to the test of experience and the appeal to public opinion?

The Constitution was made to free us, not to bind. It is lifeless without an arbiter. But it was not invented to act as a trap, to be the ready instrument for the permanent autocracy of a present majority, still less an organized minority, for the ordering of ordinary human affairs. If this work make these three propositions even a little clearer, its object will be accomplished. And of all the words with which I might make end, I will choose those of Washington describing it:

"It is provided with more checks and barriers against the introduction of tyranny, and those of a nature less liable to be surmounted, than any government hitherto instituted among mortals hath possessed. We are not to expect perfection in this world; but mankind, in

modern times, have apparently made some progress in the science of government. Should that which is now offered to the people of America, be found on experiment less perfect than it can be made, a constitutional door is left open for its amelioration."



DIAGRAM OF STATE AND FEDERAL POWER.

(The blue colors indicate permission; the red and yellow prohibition.)

A (blue), powers permitted to U. S. (19); AB (dark blue), powers permitted to both Nation and the States (4); B (light blue), powers expressly reserved to the States (simply) (3); BX (purple), powers expressly reserved to the States and forbidden to U. S. (12); X (red), powers forbidden to U. S. (simply) (37); Z (yellow), powers forbidden to the States (simply) (11); AZ (green), Federal powers forbidden to States (43); ZX (orange), powers forbidden to both States and U. S. (14); Y (white), rights or powers reserved in the people (39). (See Chapter IX.)

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